SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 422

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS

vs.

ILLINOIS CENTRAL RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

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File No. 38,025. Delaware, D.C.U.S.

Term no. 422

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

Filed September 1, 1933. File no. 422 O.T. 1933

1 [*Caption omitted.*]

No. 1012 in Equity

In United States District Court, District of Delaware

ILLINOIS CENTRAL RAILROAD COMPANY, MISSOURI PACIFIC RAILROAD Company, The Chicago Rock Island and Pacific Railway Company, (J. M. Kurn and John G. Lonsdale, Receivers), St. Louis Southwestern Railway Company, The Kansas City Southern Railway Company, Chicago and Eastern Illinois Railway Company, Southern Railway Company, Louisville and Nashville Railroad Company, The New York Central Railroad Company, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, Lehigh Valley Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Reading Company, The Central Railroad of New Jersey, New York, Ontario and Western Railway Company, The Delaware and Hudson Company, The New York, New Haven and Hartford Railroad Company, Boston and Maine Railroad, The Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, Grand Trunk Western Railway Company, Wabash Railway Company, (Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers), Pere Marquette Railway Company, The New York, Chicago and St. Louis Railroad Company, The Ann Arbor Railroad Company, The Akron, Canton and Youngstown Railway Company, The Pittsburgh and Lake Erie Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, and Western Maryland Railway Company, plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, defendants

2 *Docket entries*

Feby. 2, 1933. Bill of complaint filed; same day subpoenas issued returnable February 22, 1933.

Feby. 7, 1933. Subpoenas with affidavit as to service on defendants filed.

Feby. 8, 1933. Motion for preliminary injunction filed; same day order setting motion down for hearing February 27, 1933, at 10 o'clock a.m.; affidavits to be filed by plaintiffs on or before February 14, 1933, by defendants on or before February 23, 1933, and by plaintiffs in reply on or before February 27, 1933; same day order filed. (Exit copies to solicitors.)

Feby. 20, 1933. Order extending time for filing affidavits; same day order filed.

Feby. 21, 1933. Answer of Interstate Commerce Commission filed.

Feby. 23, 1933. Affidavits of J. R. Staley, Robert D. Reeves, O. M. Meyne, S. C. Matthews and J. P. Patterson, on behalf of plaintiffs, filed.

Feby. 27, 1933. Affidavit of George A. Casey on behalf of Interstate Commerce Commission filed.

Feby. 27, 1933. Answer of United States of America filed.

Feby. 27, 1933. Petition of American Barge Line Company filed; same day order granting petitioner leave to intervene as party defendant; same day order filed.

Feby. 27, 1933. Affidavit of Andrew P. Calhoun on behalf of American Barge Line Company, filed.

Feby. 27, 1933. Petition of Inland Waterways Corporation filed; same day order granting petitioner leave to intervene as party defendant; same day order filed.

Feby. 27, 1933. Answer of Inland Waterways Corporation filed.

Feby. 27, 1933. Affidavit of T. Q. Ashburn on behalf of Inland Waterways Corporation filed.

Feby. 27, 1933. Petition of Mississippi Valley Association filed; same day order granting petitioner leave to intervene as party defendant; same day order filed.

Feby. 27, 1933. Petition of Mississippi Valley Barge Line Company filed; same day order granting petitioner leave to intervene as party defendant; same day order filed.

Feby. 27, 1933. Motion of plaintiffs to strike certain paragraphs from intervening petition of Inland Waterways Corporation filed.

3 Feby. 27, 1933. Motion of plaintiffs to amend bill of complaint by striking out The Delaware and Hudson Company as party-plaintiff, filed.

Feby. 27, 1933. Hearing on motion for preliminary injunction.

Mar. 8, 1933. Defendants' requests for findings of fact and conclusions of law filed.

Mar. 11, 1933. Requests of intervenors for findings of fact and conclusions of law filed.

Mar. 16, 1933. Plaintiffs' requests for findings of fact and conclusions of law, filed.
Apr. 14, 1933. Stipulation filed.
June 14, 1933. Opinions of court filed.
June 26, 1933. Final decree that order of Interstate Commerce Commission be set aside and annulled and defendants be perpetually enjoined, &c.; same day decree filed.
August 9, 1933. Petition of denfendants and intervening defendants for appeal, with assignment of errors, filed; same day order allowing appeal; same day order filed.
August 9, 1933. Citation issued.
August 9, 1933. Citation, with acceptance of service by solicitor for plaintiffs-appellees endorsed thereon, filed.
August 9, 1933. Statement as to jurisdiction on appeal filed.
August 9, 1933. Notice of service of copies of appeal papers filed.
August 9, 1933. Praecipe for transcript of record filed.
August 16, 1933. Notice to Attorney General of the State of Delaware of appeal, with acceptance of service endorsed thereon, filed.

4 (File endorsement omitted.)

5 In United States District Court

(Title omitted.)

6 *Bill of complaint.*

Filed February 2, 1933

To the Honorable, the Judges of the District Court of the United States for the District of Delaware:

The Illinois Central Railroad Company, Missouri Pacific Railroad Company, The Chicago, Rock Island and Pacific Railway Company, J. M. Kurn and John G. Lonsdale, receivers of the railroads and properties of St. Louis-San Francisco Railway Company, St. Louis Southwestern Railway Company, The Kansas City Southern Railway Company, Chicago and Eastern Illinois Railway Company, Southern Railway Company, Louisville and Nashville Railroad Company, The New York Central Railroad Company, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, Lehigh Valley Railroad Company, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Reading Company, The Central Railroad Company of New Jersey, New York, Ontario and Western Railway Company, The Delaware
7 and Hudson Company, The New York, New Haven and Hartford Railroad Company, Boston and Maine Railroad, The Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, Grand Trunk Western Railway Company, Wal-

ter S. Franklin and Frank C. Nicodemus, Jr., receivers of the railroads and properties of Wabash Railway Company, Pere Marquette Railway Company, The New York, Chicago and St. Louis Railroad Company, The Ann Arbor Railroad Company, The Akron, Canton & Youngstown Railway Company, The Pittsburgh and Lake Erie Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, and Western Maryland Railway Company, as plaintiffs, complaining of the United States of America and Interstate Commerce Commission, as defendants, respectfully represent:

I

1. The Illinois Central Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Illinois, and operates lines of railroad in the States of Illinois, Iowa, Louisiana, and other States.

Missouri Pacific Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Missouri, and operates lines of railroad in the States of Missouri, Arkansas, Illinois, and other States.

The Chicago, Rock Island and Pacific Railway Company is a corporation organized under and by virtue of the laws of the States of Illinois and Iowa, and operates lines of railroad in the States of Illinois, Iowa, Missouri, Arkansas, Louisiana, Kansas, Oklahoma, and other States.

8 St. Louis Southwestern Railway Company is a railway corporation organized under and by virtue of the laws of the State of Missouri, and operates lines of railroad in the States of Illinois, Arkansas, Louisiana, and Missouri.

The Kansas City Southern Railway Company is a railway corporation organized under and by virtue of the laws of the State of Missouri, and operates lines of railroad in the States of Missouri, Kansas, Arkansas, Oklahoma, and other States.

St. Louis-San Francisco Railway Company is a railway corporation organized under the laws of the State of Missouri, owns lines of railroad in the States of Missouri, Kansas, Arkansas, Oklahoma, and other States, and since November 1, 1932, its railroads and properties have been and are now being operated by J. M. Kurn and John G. Lonsdale, duly appointed as receivers thereof by an order of the District Court of the United States for the Eastern District of Missouri.

Chicago and Eastern Illinois Railway Company is a railway corporation organized under and by virtue of the laws of the State of Illinois, and operates lines of railroad in the States of Illinois and Indiana.

Southern Railway Company is a railway corporation organized under and by virtue of the laws of the State of Virginia, and operates lines of railroad in the States of Illinois, Tennessee, Kentucky, West Virginia, Virginia, and other States.

Louisville and Nashville Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Kentucky, and operates lines of railroad in the States of Illinois, Indiana, Kentucky, Tennessee, and other States.

9 The New York Central Railroad Company is a railway corporation organized under and by virtue of the laws of the States of New York, Ohio, Illinois, Indiana, Pennsylvania, Michigan, and other States, and operates lines of railroad in such States and other States.

The Pennsylvania Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Pennsylvania, and operates lines of railroad in the States of New Jersey, Pennsylvania, Maryland, Ohio, Indiana, Illinois, and other States.

The Baltimore and Ohio Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Maryland, and operates lines of railroad in the States of Maryland, Pennsylvania, Ohio, Indiana, Illinois, and other States.

Lehigh Valley Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Pennsylvania, and operates lines of railroad in the States of Pennsylvania, New York, and other States.

The Delaware, Lackawanna and Western Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Pennsylvania, and operates lines of railroad in the States of New York, Pennsylvania, and other States.

Erie Railroad Company is a railway corporation organized under and by virtue of the laws of the State of New York, and operates lines of railroad in the States of New York, New Jersey, Pennsylvania, and other States.

Reading Company is a railway corporation organized under
10 and by virtue of the laws of the State of Pennsylvania, and operates lines of railroad in the States of Pennsylvania and New Jersey.

The Central Railroad Company of New Jersey is a railway corporation organized under and by virtue of the laws of the State of New York, and operates lines of railroad in the States of Pennsylvania, New York, and New Jersey.

New York, Ontario and Western Railway Company is a railway corporation organized under and by virtue of the laws of the State of New York, and operates lines of railroad in the States of New York, Pennsylvania, and New Jersey.

The Delaware and Hudson Company is a railway corporation organized under and by virtue of the laws of the State of New York, and operates lines of railroad in the States of New York and Pennsylvania.

The New York, New Haven and Hartford Railroad Company is a railway corporation organized under and by virtue of the laws of the States of Connecticut, Massachusetts and Rhode Island, and operates

lines of railroad in the States of Massachusetts, Connecticut, New York, and Rhode Island.

Boston and Maine Railroad is a railway corporation organized under and by virtue of the laws of the State of New York, and operates lines of railroad in the States of Maine, Massachusetts, New Hampshire, Vermont, and New York.

The Chesapeake and Ohio Railway Company is a railway corporation organized under and by virtue of the laws of the States of Virginia and West Virginia, and operates lines of railroad in Virginia, West Virginia, and other States.

11 Norfolk and Western Railway Company is a railway corporation organized under and by virtue of the laws of the State of Virginia, and operates lines of railroad in the States of Virginia, West Virginia, Maryland, and other States.

Grand Trunk Western Railway Company is a railway corporation organized under and by virture of the laws of the States of Michigan and Indiana, and operates lines of railroad in the State of Michigan and elsewhere.

Wabash Railway Company is a railway corporation organized under the laws of the State of Indiana, and owns lines of railroad located in the States of Missouri, Iowa, Illinois, Indiana, and other States, and since December 1, 1931, its railroads and properties have been and are now being operated by Walter S. Franklin and Frank C. Nicodemus, Jr., duly appointed as receivers thereof by an order of the District Court of the United States for the Eastern District of Missouri.

Pere Marquette Railway Company is a railway corporation organized under and by virtue of the laws of the State of Michigan, and operates lines of railroad in that State.

The New York, Chicago and St. Louis Railroad Company is a railway corporation organized under and by virtue of the laws of the States of Ohio, New York, Pennsylvania, Indiana, and Illinois, and operates lines of railroad in those States.

The Ann Arbor Railroad Company is a railway corporation organized under and by virtue of the laws of the State of Michigan, and operates lines of railroad in that State.

12 The Akron, Canton & Youngstown Railway Company is a railway corporation organized under and by virtue of the laws of the State of Ohio, and operates a line of railroad in that State.

The Pittsburgh and Lake Erie Railroad Company is a railway corporation organized under and by virtue of the laws of the States of Pennsylvania and Ohio, and operates lines of railroad in those States.

The Atchison, Topeka and Santa Fe Railway Company is a railway corporation organized under and by virtue of the laws of the

State of Kansas, and operates lines of railroad in the States of Illinois, Iowa, Missouri, Kansas, and other States.

Western Maryland Railway Company is a railway corporation organized under and by virtue of the laws of the States of Maryland and Pennsylvania, and operates lines of railroad in the States of Pennsylvania, West Virginia, and Maryland.

Each of said plaintiffs is a carrier by railroad, subject to the Interstate Commerce Act, is engaged in the transportation of freight and passengers for hire between points on its lines and between points on its lines, on the one hand, and points on the lines of other carriers by railroad on the other, throughout the United States, and was such carrier by railroad and engaged in the transportation of freight and passengers as heretofore described at all times herein mentioned.

2. Defendant, the United States of America, is made a party defendant as directed by the Congress of the United States and as required by section 46 of title 28 of "The Code of the Laws of the United States of America."

13 3. Defendant Interstate Commerce Commission is a public corporation and administrative tribunal created by the act to regulate commerce, approved February 4, 1887, as amended (Interstate Commerce Act), is specifically charged with the administration and enforcement of the provisions of said act and of the Inland Waterways Corporation Act, particularly section 3 (e) thereof (U.S. Code, title 49, sec. 153), and is hereinafter referred to as the Commission.

4. The American Barge Line Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, is engaged in transportation as a common carrier by water, operating barges on the Ohio and Mississippi Rivers between Pittsburgh, in the State of Pennsylvania, and New Orleans, in the State of Louisiana, and receives and delivers freight at intermediate points between the termini just described.

II

The orders of the Commission herein sought to have enjoined, set aside, suspended, and annulled relate to transportation, and were made upon petition of the American Barge Line Company, a corporation, as stated, organized under the laws of the State of Delaware, and a resident of that State, by reason whereof and in accordance with an act of Congress, approved October 22, 1913 (38 Stat. L. 219), known as the District Court Jurisdiction Act, providing for the institution of suits to suspend, annul, enjoin, or set aside, in whole or in part, any order or orders of the In-

14 terstate Commerce Commisison, this court has full and complete jurisdiction to hear and determine this proceeding.

III

1. My application filed March 21, 1931, as amended, the American Barge Line Company, under the provisions of section 3 (e) of the Inland Waterways Corporation Act (U.S.C.A., title 49, sec. 153), as amended May 29, 1928, sought at the hands of the Commission a certificate of public convenience and necessity authorizing operations on the Mississippi and Ohio Rivers between said cities of Pittsburgh and New Orleans, including traffic to and from all intermediate ports, and the establishment on all classes and commodities suitable for river transportation of through barge-rail and rail-barge-rail rates in connection with such river transportation via specified ports of interchange.

2. On March 11, 1932, the Commission, acting upon said application in a certain proceeding known as ex parte no. 102, by order required certain carriers by railroad and their connections, including certain of these plaintiffs, to establish in connection with the American Barge Line Company through barge-rail rates on classes and commodities generally between points described in such orders and report of the Commission and made a part thereof, and also to join with said American Barge Line Company in through rail-barge-rail rates between points described in such report and orders in accordance with certain rules, regulations, and formulae in such report and orders specified.

15 3. Thereafter, on June 14, 1932, the Commission, in said docket, Ex Parte No. 102, application of American Barge Line Company, in response to a petition of that company, filed with the Commission on May 17, 1932, entered its supplemental report and order requiring carriers by railroad and their connections, including certain of these plaintiffs, to establish additional through barge-rail rates and routes on classes and commodities generally over the routes of the American Barge Line Company and connecting carriers by railroad.

4. At the time of the making and entering by the Commission in Ex Parte No. 102 of the reports and orders heretofore referred to, carriers by railroad, including these plaintiffs, maintained through all-rail rates on cotton from points in the Southwest, including points in the State of Arkansas, and including Memphis, Tennessee, on the basis generally prescribed by the Commission in a certain proceeding before that body, known as Rate Structure Investigation, I.C.C. Docket No. 17,000, part 3, Cotton, and reported at 165 I.C.C. 595, and supplemental reports.

These any-quantity rail rates on cotton applied from the points of origin heretofore described to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut were normal rates designed to meet the needs of the traffic, and were not depressed by reason of other and competitive forms of transportation.

Pursuant to the terms of said orders, certain of these plaintiffs and other carriers by railroad joined with said American Barge Line Company in the establishment of barge-rail and rail-barge-rail
16 rates on cotton, in any quantity, from points in Arkansas and from Memphis, Tennessee, to the destination territory above described, by deducting either 20 or 10 percent of the all-rail rates applicable between the ports via which said barge line handled said through shipments, all in accordance with the terms and requirements of the formulae contained in said orders.

5. On August 29, 1932, plaintiffs and other carriers by railroad established carload rates upon cotton from points in Arkansas and from Memphis, Tennessee, to the destination territory above described because of severe competition from unregulated truck and water carriers upon a basis materially lower than the any-quantity rates on cotton theretofore prevailing, and on November 16, 1932, further reduced said carload rates on cotton in the belief that such further reduced rates were necessary to meet the competition above referred to.

6. By petition dated October 31, 1932, the American Barge Line Company requested the Commission to enter an order requiring the carriers by railroad, including certain of these plaintiffs and named in previous orders of the Commission in said Docket Ex parte no. 102, to establish with said American Barge Line Company through rail-barge-rail rates on cotton, in carload lots, from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, and by petition dated November 5, 1932, said American Barge Line Company requested the Commission to enter an order requiring the carriers by railroad, including certain of these plaintiffs,
17 to establish with the American Barge Line Company through barge-rail rates on cotton, in carloads, from Memphis, Tennessee, to all points in the States heretofore mentioned.

7. By petition dated November 12, 1932, and filed with the Commission on November 14, 1932, and by petition dated November 14, 1932, and filed with the Commission on or about November 16, 1932, carriers by railroad operating west of the Mississippi River and carriers by railroad operating lines on railroad east thereof, including plaintiffs in this action, prayed the Commission to set down for hearing the said applications of the American Barge Line Company dated October 31, 1932, and November 5, 1932, and represented to the Commission in their said petitions that without a full and complete hearing, after reasonable notice, at which hearing carriers by railroad, including plaintiffs, shippers, and other parties in interest, and including representatives of the American Barge Line Company, should be permitted to appear and offer testimony and examine and cross-examine witnesses offered by all parties in any respect interested therein, the Commission could not determine—

(a) Whether carriers by railroad, including certain of these plaintiffs, should be required to join with the American Barge Line Com-

pany in establishing through rail-barge-rail rates and through barge-rail rates on cotton, carloads, from Arkansas and Memphis, Tennessee, to the destination territory heretofore described;

(b) Whether such through rail-barge-rail rates and
14 barge-rail rates, or either of them, should be lower or the same as the through all-rail rates then in effect;

(c) What through routes, if any, should be required;

(d) What carriers by railroad, if any, should be required to participate in through rail-barge-rail routes and barge-rail routes;

(e) What rail-barge-rail routes and barge-rail routes, if any, should be established; and

(f) What differential, if any, should be maintained for the water-rail routes under the all-rail routes.

It was urged upon the Commission by said carriers by railroad, including these plaintiffs, in their said petitions for hearing before the Commission, that without testimony and without evidence the Commission could not properly, fairly, or lawfully determine or decide any of the questions presented by the said applications of the American Barge Line Company, or in any way pass upon said applications, having regard to the rights both of said Barge Line Company and carriers by railroad, including plaintiffs herein.

8. The Commission refused to grant to carriers by railroad a hearing in connection with the applications of the American Barge Line Company dated October 31 and November 5, 1932, and heretofore referred to, declined to receive any testimony thereon from any carrier by railroad or other party that might be interested therein, and acting solely upon the unverified petitions of the American Barge Line Company, the Commission, on December 10, 1932, entered its second supplemental report and order in said Ex
15 Parte No. 102 requiring certain carriers by railroad named in its first order entered therein, including certain of these plaintiffs, and their connections, to join with said American Barge Line Company in establishing on or before January 25, 1933, upon notice to the Commission and to the general public by not less than fifteen days filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint rates on cotton, in carloads, minimum 37,500 pounds, over barge-rail routes described in its reports and orders heretofore entered in said Docket Ex Parte No. 102, from Memphis, Tennessee, to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, constructed by deducting from the corresponding all-rail rate the differential of 6 cents per 100 pounds, and rail-barge-rail rates from points in Arkansas to the same destinations over rail-barge-rail routes previously prescribed, subject to the minimum weights shown below and constructed by deducting from the corresponding all-rail rates the following differentials:

8 cents—minimum 25,000–40,000 pounds.
6 cents—minimum 35,000–55,000 pounds.
4 cents—minimum 50,000–80,000 pounds.

A copy of said second supplemental report and order, marked "Exhibit A", is hereto attached and made a part hereof the same as if fully incorporated herein.

9. Thereafter the Commission modified its second supplemental order entered as aforesaid by requiring that the rates pre-
20 scribed therein be established on or before February 21, 1933, upon notice to this Commission and to the general public by not less than ten days filing and posting. In all other respects said second supplemental order of the Commission was continued in effect until the further order of the Commission.

10. By petition dated December 30, 1932, and filed with the Commission on January 9, 1933, southwestern carriers by railroad, parties to petition for hearing of date November 12, 1932, requested the Commission to vacate its said supplemental report and order heretofore referred to, reopen the entire proceedings, and prayed that such proceedings be considered and determined by the entire Commission, and by petition dated January 7, 1933, and filed with the Commission on January 9, 1933, said southwestern carriers requested the Commission to extend the effective date of its said second supplemental report entered in Ex Parte No. 102 to April 6, 1933, in order that the Commission might pass on the petition of said southwestern carriers for consideration by the entire Commission of date December 30, 1932. The petitions of said southwestern lines dated December 30, 1932, and January 7, 1933, respectively, were denied January 18, 1933.

IV

1. Plaintiffs aver that each of said plaintiffs now participates in joint through all-rail carload rates on cotton from points of origin in the State of Arkansas, or from Memphis, Tennessee, or from points in Arkansas and Memphis, Tennessee, to destinations in
21 the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, and that if the rail-barge-rail and barge-rail rates prescribed by the Commission in its said second supplemental report and order are made effective each of said plaintiffs will sustain continuing damages and substantial losses in revenue either because the cotton in the transportation of which it now participates will be diverted to rail-barge-rail or barge-rail routes, in which it cannot participate or in which it will be deprived of the full use of its lines of railroad, or because it will be required to participate in the transportation of cotton at rates which are lower than the all-rail rates in which it now participates.

2. Plaintiffs aver that the through rail-barge-rail rates and through barge-rail rates prescribed by the Commission in its said second supplemental report and order, arrived at without a hearing, without investigation, and without any facts wherein to base said rates, are improper, unlawful, unreasonable; are not fairly or rea-

sonably related to all-rail rates on cotton, in carload lots, in effect when said second supplemental report and order were entered and now in effect from and to the same points, and that the minimum differentials prescribed by the Commission in its said second supplemental report and order for application over rail-barge-rail routes from points in Arkansas to the destination territory involved and over barge-rail routes from Memphis, Tennessee, to such destination territory, if made effective, will result in through rail-barge-rail rates and through barge-rail rates from Arkansas and Memphis, Tennessee, respectively, to said destination territory that are unlawful and unreasonably low and will result in unlawfully diverting shipments of cotton from all-rail routes now participated in by these plaintiffs to the rail-barge-rail and barge-rail routes required to be established by the Commission in its said second supplemental report and order entered in Docket Ex Parte No. 102, to the great and continuing damage to these plaintiffs, and each of them, by reason of the fact that plaintiffs, and each of them, will be deprived of revenue that would accrue to them because of the movement in cotton, in carload lots, from Arkansas and Memphis, Tennessee, to the destination territory described in said second supplemental report and order over all-rail routes in which these plaintiffs now participate and in which these plaintiffs did participate at all times herein mentioned.

22

V

1. As hereinbefore alleged, the said second supplemental report and order entered by the Commission in its Docket Ex Parte No. 102 were made and entered upon the unverified petitions of the American Barge Line Company and without affording these plaintiffs, or any of them, an opportunity to be heard and submit testimony and evidence as to any facts in connection therewith.

2. Plaintiffs aver that the Commission was without jurisdiction, power, or authority to make and enter said second supplemental report and order in said Docket Ex Parte No. 102, because at all times prior to the making and entering of said second supplemental order the Commission denied to these plaintiffs, and to each of them, an opportunity to appear before said Commission, or any representative or employee thereof, and offer testimony and place before the Commission facts, circumstances, and conditions so as to enable the Commission before entering said second supplemental order to determine—

23

(a) Whether public interest required or might require the establishment of the rail-barge-rail routes and rates and barge-rail routes and rates ordered to be established;

(b) Whether the rail-barge-rail rates or barge-rail rates ordered to be established, if any, should be lower than the contemporaneously ex-

isting all-rail rates between the origins and destinations covered by said second supplemental order;

(c) The transportation costs via rail-barge-rail routes and barge-rail routes compared to transportation costs via all-rail routes;

(d) The needs of these plaintiffs, and each of them, for revenue as compared with the financial needs of the American Barge Line Company;

(e) Whether the establishment of said rail-barge-rail routes and rates and barge-rail routes and rates requested by the American Barge Line Company would in the operation thereof substantially impair the revenues of these plaintiffs; and

(f) Whether, having regard to the level and measure of the all-rail rates, public interest and the maintenance of an adequate transportation system by railroad required or permitted the establishment of rail-barge-rail and barge-rail routes and rates ordered
24 to be established and maintained by said second supplemental order.

3. Plaintiffs allege that had the Commission, before entering its said second supplemental report and order in said Docket Ex Parte No. 102, afforded these plaintiffs an opportunity to appear and offer testimony of the kind and character described in the paragraph next above, they would have offered before the Commission testimony showing:

(a) That the public interest did not at any time and does not now require the establishment of the rail-barge-rail and barge-rail routes and rates required to be established in said second supplemental order;

(b) That if such rail-barge-rail and barge-rail rates and routes were established, said rail-barge-rail and barge-rail rates should not be lower than the rail rates between the same points;

(c) That the transportation costs via said rail-barge-rail and barge-rail routes are and would be substantially equal to the transportation costs via all-rail routes;

(d) That these plaintiffs, and each of them, were and are in need of revenue in order to maintain an adequate system of transportation by rail, and that to prescribe the rail-barge-rail and barge-rail rates and routes contained in said second supplemental report and order would be to increase the needs of these plaintiffs, and each of them, for revenue;

(e) That the operation of the rail-barge-rail and barge-rail
25 rates and routes petitioned for by the American Barge Line Company in its said petitions of October 31st and November 5th, 1932, differentially under the all-rail routes contemporaneously in effect, would substantially impair the revenues of these plaintiffs, and each of them; and

(f) That, in view of the necessity for an adequate transportation system by railroad, including the railroads of these plaintiffs, the

rail-barge-rail and barge-rail rates and routes required to be established in said second supplemental report and order should not be established.

VI

Plaintiffs further allege that, by reason of the fact that plaintiffs, and each of them, were not afforded a hearing, were not afforded an opportunity to offer testimony of the kind and character before described, before the making and entering by the Commission of its said second supplemental report and order in said Docket Ex Parte No. 102, said second supplemental report and order and every part thereof is unlawful and void and beyond the power and authority of the Commission to make, and if enforced against these plaintiffs, or any of them, takes the property of these plaintiffs, and each of them, without due process of law, in violation of the provisions of amendment V to the Constitution of the United States.

VII

1. Plaintiffs also aver that the action of the Commission in
26 not affording to plaintiffs, and to each of them, an opportunity to be heard and offer testimony before making and entering said second supplemental report and order in Docket Ex Parte No. 102, is based upon the fact that the Commission has construed the provisions of section 3 (e) of the Inland Waterways Corporation Act (U.S.C.A., title 49, sec. 153), as amended May 29, 1928, as neither authorizing nor requiring a hearing by the Commission before entering orders of the kind and character of said second supplemental report and order, and acting upon such construction of such statute, the Commission at all times denied these plaintiffs a hearing of any kind before entering said second supplemental report and order.

2. Plaintiffs show that the questions as to what rail and water rates, upon what commodities applicable, limitations as to routes, and the relationship which rail-water and rail-water-rail rates should properly bear to all-rail rates between the same points are of infinite complexity and cannot be properly and fairly determined by the Commission without the benefit of a full and fair hearing and the presentation of competent and lawful evidence by all parties interested therein.

VIII

Plaintiffs aver that said section 3 (e) of the Inland Waterways Corporation Act, as amended, neither requires nor authorizes the issuance by the Commission of orders establishing joint through rail-water and rail-water-rail routes and rates without prior hear-
27 ing upon the issues involved, and that in issuing said second supplemental report and order without according to plain-

tiffs and to other carriers by railroad a full and fair hearing, the Commission misinterpreted and misconstrued said section 3 (e) of the Inland Waterways Corporation Act, as amended, and proceeded upon a misconception thereof and of its powers and duties thereunder, by reason whereof the order of the Commission is void and is in excess of the duties and powers created and imposed by said section 3 (e) of the Inland Waterways Corporation Act, as amended.

IX

Plaintiffs further aver that if the Commission has correctly construed or applied the provisions of section 3(e) of the Inland Waterways Corporation Act (U.S.C.A., title 49, sec. 153), as amended May 29, 1928, and that if such provisions either authorize or require the Commission to enter its said second supplemental report and order in said Docket Ex Parte No. 102, without affording these plaintiffs, and each of them, a reasonable opportunity to be heard and offer testimony in opposition to the granting of the petitions of the American Barge Line Company, dated, respectively, October 31 and November 5, 1932, before the Commission made or entered any report or order in connection therewith, then the provisions of said section 3(e) of the Inland Waterways Corporation Act (U.S.C.A., title 49, sec. 153), as amended May 29, 1928, are void, contravene the provisions of amendment V to the Constitution of the
28 United States and take the property of these plaintiffs, and each of them, without due process of law, in violation of said amendment V to the Constitution of the United States.

X

Plaintiffs further aver that if the interpretation placed by the Commission upon said section 3(e) of the Inland Waterways Corporation Act, as amended, is correct, then the provisions of said section 3(e) are unconstitutional and void because in contravention of the provisions of article I of the Constitution of the United States, because said section 3(e), so construed as permitting the Commission to establish through rail-water and rail-water-rail routes and rates differentially related to all-rail routes and rates between the same points without the benefit of hearing as to the issues involved, constitutes an unlawful delegation by Congress of its legislative power and authority, contrary to article I of the Constitution of the United States.

XI

The said second supplemental order requires the carriers by railroad, parties thereto, including certain of these plaintiffs, to put into effect the rail-barge-rail and barge-rail rates and routes prescribed in said second supplemental order on or before February 21, 1933, upon not less than ten days' filing and posting in the

manner prescribed in section 6 of the Interstate Commerce
29 Act. And, unless the enforcement, operation, and execution of said second supplemental order is restrained and suspended during the pendency of this proceeding, irreparable injury will ensue to plaintiffs in that they will be compelled under the severe penalties prescribed by the Interstate Commerce Act to establish and participate in the rail-barge-rail and barge-rail rates fixed by said order at a heavy and substantial loss in revenues, because said rates are substantially lower and will yield substantially less revenue than the all-rail rates now in effect and in which plaintiffs participate; or will, as hereinbefore particularly alleged, sustain substantial losses in revenue because of the diversion of traffic from all-rail routes in which such plaintiffs now participate to rail-barge-rail and barge-rail routes in which said plaintiffs cannot participate, or will be deprived of the full use of their lines of railroad.

No part of the damages that will be sustained by plaintiffs, and each of them, if the said second supplemental order is made effective, can be restored to said plaintiffs, but will remain a permanent loss to plaintiffs.

XII

Wherefore, plaintiffs pray:

(a) That a subpoena or subpoenas in chancery issue out of and under the seal of this honorable court directed to the defendants, as required by law, and that due and proper service of such process and of this bill of complaint be forthwith made by filing a
30 copy thereof in the office of the Secretary of the Commission, and another copy in the Department of Justice, as in said District Court Jurisdiction Act provided, and that thereby the defendants, and each of them, be required, on or before a date to be specified in such subpoena or notice, to appear herein and answer this bill of complaint, but not under oath, answer under oath being hereby expressly waived.

(b) That a temporary or interlocutory injunction be entered herein, restraining, enjoining, and suspending, until the further order of this court, the effect and enforcement of said order of the Commission.

(c) That pending a hearing upon the aforesaid application for a temporary or interlocutory injunction a preliminary restraining order be issued in terms restraining, enjoining, and suspending the enforcement of said order of the Commission until said application for a temporary or interlocutory injunction shall have been heard and determined.

(d) That after final hearing this court adjudge, order, and decree that said order of the Commission is and has at all times been beyond the lawful authority of the Commission, and wholly void, and that said order be perpetually set aside, suspended, and annulled, and the enforcement perpetually enjoined.

(e) That complainants, and each of them, may have such other and further relief in the premises as to equity and justice may
31 appertain and as may be deemed by this honorable court to be adequate and proper under the circumstances.

ELMER A. SMITH,
A. B. ENOCH,
M. G. ROBERTS,
W. A. COLE,
BRONSON JEWELL,
M. CARTER HALL,
JOHN F. CONNERS,
A. H. KIRKADDEN,
JAMES STILLWELL,
D. B. CONNELL,
E. ENNALLS BERL,
HERBERT S. HARR,
M. B. PIERCE,
W. A. NORTHCUTT,
W. N. MCGEHEE,
H. H. LARIMORE,
R. S. OUTLAW,

Solicitors for Plaintiffs,
2008 Missouri Pacific Bldg., St. Louis, Mo.

32 [*Duly sworn to by J. R. Staley, jurat omitted in printing.*]

33 *Exhibit A to bill of complaint*

Interstate Commerce Commission

Ex Parte No. 102

Application of American Barge Line Company

Decided December 10, 1932

Barge-rail and rail-barge-rail rates on cotton, in carloads, from certain points in Arkansas and Memphis, Tenn., to eastern territory and New England prescribed. Prior reports, 182 I.C.C. 521 and 185 I.C.C. 483

SECOND SUPPLEMENTAL REPORT OF THE COMMISSION

Division 4, Commissioners Meyer, Eastman, and Mahaffie

By Division 4:

In the original report in this proceeding, 182 I.C.C. 521, we granted applicant a certificate of public convenience under the provisions of section 3 (e) of the Inland Waterways Corporation Act, as amended by the so-called Denison Act, covering its operations on the Ohio and Mississippi Rivers, and required the establishment of through routes and joint rates, on both class and commodity traffic, between points in trunk-line territory and southern New England, on the one hand, and Memphis, Tenn., and points in Arkansas,
34 on the other hand. Certain additional routes and rates were required by a supplemental report, 185 I.C.C. 483. The prior reports were adopted March 11 and June 14, 1932, respectively, and

the findings provided for joint barge-rail and rail-barge-rail rates differentially related to the corresponding all-rail routes contemporaneously applicable and made by use of the so-called Ex Parte No. 96 formula originally adopted for use in connection with the Federal barge lines. Rates and differentials will be stated in amounts per 100 pounds.

At the time of the adoption of the orders above referred to the all-rail rates on cotton from points in the Southwest were any-quantity rates on the basis prescribed in Rate Structure Investigation, part 3, Cotton, 165 I.C.C. 595. The rate on compressed cotton from Little Rock, Ark., to Boston, Mass., for example, was $10. About September 1, 1932, the southwestern railroads published carload rates on cotton to various points, including those in trunk-line territory and New England, considerably lower than the any-quantity rates.

These new carload rates were established because of competition from unregulated truck and water carriers and bear an expiration date of July 31, 1933. In November 1932 the new carload rates were further reduced on the ground that they originally had not been made low enough to accomplish the desired purpose.

Because the carload rates are regarded as depressed rates compelled by strong competition, the rail lines connecting with the applicant have declined to join with it in rail-barge-rail and barge-rail rates differentially related to the carload all-rail rates. The applicant has, therefore, filed petitions with us, seeking supplemental orders requiring the establishment of rail-barge-rail rates from all points in Arkansas and barge-rail rates from Memphis to all points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, applicable via the applicant's line between Memphis and Pittsburgh, Pa., and based on differentials under the carload rail rates.

The present all-rail rates from Little Rock and grouped points to all of trunk-line territory and New England are as follows: 69 cents, minimum 50,000–80,000 pounds (depending on length of car); 75 cents, minimum 35,000–55,000 pounds; 84 cents, minimum 25,000–40,000 pounds. These rates apply on cotton in bales, compressed or uncompressed. The rate from Memphis to the same destinations is 69 cents, minimum 37,500 pounds. The applicant suggests that the rail-barge-rail rates from Arkansas be based on differentials of 9, 10, and 11 cents, respectively, under the all-rail rates. It proposes a differential of 10 cents for the barge-rail rate from Memphis. Applicant urges that these proposed differentials are consistent with the Ex Parte No. 96 formula, since they approximate 20 percent of a theoretical all-rail rate from Memphis to Pittsburgh arrived at by reducing the present Memphis-Pittsburgh any-quantity rate proportionately to the difference between the carload any any-quantity rates to the East.

The southwestern rail carriers contend that they should not be required to join in the rates proposed by the applicant, because

the all-rail carload rates are experimental and published only
36 in an endeavor to retrieve traffic lost to unregulated forms of transportation, including the applicant's barge line, and are below maximum reasonable rates. They point out that applicant seeks rates from all points in Arkansas, whereas under the circuity limitations imposed in our original report, routes were established from only a limited number of Arkansas points to the destination territory here involved. It is further contended that establishment of the rates sought by applicant would be a source of disadvantage to many producers and consumers of cotton in the South and Southwest. Comments of the so-called east-side rail lines, with which the applicant competes between Memphis and Louisville, Kentucky, are somewhat similar. These lines denounce the applicant for engaging in what is alleged to be destructive competition with them by "demoralizing the rate situation on the Ohio and Mississippi rivers on coffee, sugar, cotton, and other commodities" through its unregulated port-to-port rates. They further assert that applicant's water route from Memphis to Pittsburgh is not practicable for the transportation of cotton and no more economical than the all-rail routes. The eastern trunk lines with which applicant connects at Pittsburgh likewise oppose its petitions. All the rail carriers urge that these petitions should not be acted on except after hearing.

Replies in opposition to the petitions have been filed on behalf of warehouse and compress concerns at Memphis and certain southwestern points, which consider a hearing as to proposed differential rates necessary to protect their interests, and on behalf of the American Cotton Manufacturers' Association and other organiza-
37 tions representing southern textile manufacturers, who fear that any further reduction in rates available to eastern manufacturers would adversely affect the southern mills. Letters and telegrams protesting against the establishment of the rates sought by the applicant and requesting that the petitions be set for hearing have been received from the principal commercial traffic organizations of Memphis and New Orleans, and a cotton cooperative association at Greenwood, Miss.

In response to the considerable number of requests that these petitions be assigned for hearing, it should be pointed out that in Procedure Under Barge Line Act, 148 I.C.C. 129, after instituting a proceeding to ascertain the views of interested parties with respect to the meaning and purpose of the Denison Act before undertaking its administration, we came to the conclusion that that act does not authorize hearings as to the differential rates referred to herein, being "an attempt to substitute for hearings prior to our orders establishing through routes and joint rates, fixing differentials, and prescribing equitable divisions, subsequent hearings upon complaint." The reasons for that conclusion were very fully stated in that report, are quite as applicable here, and need not be repeated. No petitions for reconsideration were thereafter filed. We further pointed out

that the act made provision for possible changes in level in the following sentence contained therein:

"Such joint routes, rates, rules, regulations, and practices may be changed by order of the Commission or by agreement of the water carriers and the other participating carriers."

There is no provision for hearings in connection with such modifying orders, and to hold prior hearings would be inconsistent with the plain intent of the act. In the past we have entered such orders without hearing on several occasions when the need therefor was brought to our intention. In the prior orders in this proceeding we prescribe rates on cotton applicable on shipments in any quantity corresponding to the application of the rail rates. We are now called on to change those rates in so far as they apply on carload shipments of certain minimum weights in the light of changes which have been made in the rail rates. The facts upon which we rely in this report are verified by the tariffs in our files and by information obtained in connection with other proceedings.

The question of our power to prescribe joint rates between rail lines and a water carrier differentially lower than corresponding all-rail rates which are admittedly lower than maximum reasonable rates arose in Inland Waterways Corp. *v.* C. G. W. R. R. Co., 129 I.C.C. 521. We there stated it to be our opinion that—

"we are warranted in prescribing rates which are relatively reasonable measured by the rates in effect over existing through routes between the same points. Furthermore, in prescribing such reasonable rates over a barge-rail route they may properly be made somewhat lower than the rates in effect over the competitive all-rail routes, provided the shrink is borne by the barge line . . ."

This conclusion was supported by the subsequent passage of the Denison Act, concerning which we said in Procedure Under Barge Line Act, supra:

39 "The immediately following direction that we shall 'fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service' also makes it clear that the latter shall be fixed in terms of a relationship with the corresponding all-rail rates, i.e., that we shall fix a minimum spread which shall persist even if changes are made in the level of the rates."

The all-rail carload rates with which a differential relationship is here sought by the applicant are new rates supplementing the rates in effect on the date of our prior orders in this proceeding. The former findings as to a proper differential under those rates are not controlling here, and it becomes necessary to consider the question in the right of present conditions. It should be noted that applicant is not proposing differentials as great as those which would result from applying the formula followed in our former findings, presumably recognizing the depressed nature of the base all-rail rates.

The question of the amount of the differentials to be prescribed is difficult, and the petitions and replies throw little light upon it. Under the law the differentials must be such that the joint rail-water

transportation to which they relate shall be upon terms reasonably fair to both rail and water carriers, not designed to divert traffic from one or the other, but to reflect differences in cost and value of service. At the time of the establishment of the all-rail carload rates from the Southwest to eastern points, rates of a similar nature were established from Arkansas to New Orleans. By agreement between the Federal barge lines and the southwestern rail carriers
40 barge-rail rates via Memphis were established, reflecting the following differentials: Minimum 25,000–40,000 pounds (depending on length of car), 5 cents; minimum 35,000–55,000 pounds; minimum 50,000–80,000 pounds, 2 cents. There are differences between the character of the service performed by the applicant and that of the Federal lines, some of which applicant points out. The all-rail rates to eastern territory are also higher than those to New Orleans. Therefore we think the differentials may be somewhat greater than those governing the rates via the Federal lines to New Orleans, but less than those which the applicant requests.

Upon further consideration of the matters involved in this proceeding we find that the rates heretofore prescribed on cotton, insofar as they apply on shipments in carloads, should be changed; that rates on cotton, in carloads, from points in Arkansas to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut should be established for application only over rail-barge-rail routes heretofore prescribed in this proceeding from and to such points, based on the following differentials under the corresponding all-rail rates, which we find to be reasonable minimum differentials: 8 cents, minimum 25,000–40,000 pounds; 6 cents, minimum 35,000–55,000 pounds; 4 cents, minimum 50,000–80,000 pounds. We further find that a barge-rail rate on cotton, in carloads, minimum 37,500 pounds, from Memphis to the destinations above referred to should be established for application only over barge-rail routes heretofore prescribed in this proceeding from and to such points based on a differential of 6 cents, which we find to be a reasonable minimum differential.

41 Mahaffie, Commissioner, dissenting:

No hearing has been held on these applications. No record is before us. The majority action is based on the applicant's two unverified petitions. The all-rail rates here considered are about 50 percent of what we have held to be reasonable maximum rates. Notwithstanding this, the majority prescribe minimum differentials thereunder for the water-rail routes required. In my judgment, section 3(e) of the Inland Waterways Corporation Act, read with section 15(3) of the Interstate Commerce Act and considered in the light of the purpose of the Congress as stated in section 500 of the Transportation Act, does not require us to decide a case such as this without the benefit of a record. Section 3(e) provides that on the issuance of a certificate of public convenience and necessity we "shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through

routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the Commission shall, in such order, fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service to apply until changed by order of the Commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the Commission or by agreement of the water carriers and the other participating carriers." We complied fully with this direction at the time the certificate issued. I do not understand the provision to require that orders be issued without hearing or record on subsequent applications not involving a certificate.

We need a record here in order to decide intelligently. The
42 persons who claim they will be greatly hurt if the petitions are granted ought to have a chance to put the facts before us. I would set the applications, when properly verified as required by our rules of practice, for hearing.

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D.C., on the 10th day of December, A.D. 1932

Ex Parte No. 102

Application of American Barge Line Company

Upon further consideration of the matters and things involved in the above-entitled proceeding

It is ordered, That the second ordering paragraph of the order of March 11, 1932, in said proceeding be, and it is hereby, amended to read as follows:

"It is further ordered, That, except as provided in the next succeeding paragraph hereof, said common carriers by rail, parties to the through routes prescribed in the next preceding paragraph hereof, be, and they are hereby, directed and required to join with said American Barge Line Company in establishing, on or before September 19, 1932, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint rates applicable over said through routes, constructed by deducting from the lowest all-rail rate contemporaneously applicable on corresponding traffic over any route between the same points of origin and destination the following differentials: (a) Where over barge-rail routes the shortest all-rail distance via the lines of the con-
43 necting rail carriers from point of origin to point of destination through the port of interchange does not exceed the

shortest rail distance between such points of origin and destination by more than 20 percent, where over barge-rail routes the shortest all-rail distance between the inland point of origin or destination and the port of interchange does not exceed two thirds of the shortest all-rail distance, where over rail-barge-rail routes the shortest all-rail distance from point of origin to point of destination through the port of interchange does not exceed by more than 20 percent the shortest rail distance between such points of origin and destination, and where over rail-barge-rail routes the total rail haul is not more than one half of the shortest all-rail distance between points of origin and destination, 20 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by said American Barge Line Company; and (b) in all other cases, 10 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by said American Barge Line Company; Provided, however, that no such joint commodity rate need be established where the corresponding all-rail rate over the direct route from or to an interior point to or from a port of destination or origin involves at intermediate points departures from the long-and-short-haul provision of the fourth section of the Interstate Commerce Act, nor if said American Barge Line Company and the interested rail carriers agree that no such joint commodity rate shall be established; and Provided, further, that no joint barge-rail or rail-barge-rail rate established under this order from or to any given point of origin or destination need be lower than the corresponding all-rail rate between such point of origin or destination and the port of interchange."

44 It is further ordered, That said order be, and it is hereby, further amended by inserting the following paragraph between the second and third ordering paragraphs thereof:

"It is further ordered, That said common carriers by rail, parties to the through routes hereinbefore prescribed, be, and they are hereby, directed and required to join with said American Barge Line Company in establishing on or before January 25, 1933, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint rates on cotton in carloads, minimum 37,500 pounds, over barge-rail routes hereinbefore prescribed from Memphis, Tenn., to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, constructed by deducting from the corresponding all-rail rate the differential of 6 cents per 100 pounds, and rail-barge-rail rates from points Arkansas to the same destinations over rail-barge-rail routes hereinbefore prescribed, subject to the minimum weights shown below and constructed by deducting from the corresponding all-rail rates the following differentials: 8 cents, minimum 25,000–40,000 pounds; 6 cents, minimum 35,000–55,000 pounds; 4 cents, minimum 50,000–80,000 pounds."

And it is further ordered, That in all other respects said order, as amended, shall continue in effect until the further order of the Commission.

By the Commission, division 4.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

45 In United States District Court

[Title omitted.]

Answer of United States of America.

Filed Feb. 27, 1933

United States of America, one of the defendants in the above-entitled cause, for answer to the bill of complaint filed therein against it answers and says:

I

United States admits for the purposes of this suit that the facts alleged in the opening paragraph and paragraphs I and II of the bill are true, with this exception: It says that while the Interstate Commerce Commission is charged with the administration and enforcement of so much of the Inland Waterways Corporation Act as is involved in this suit, said Commission is not charged with enforcement of all the provisions of said act, as concluded in subparagraph (3) of said paragraph I.

II

46 United States admits the truth of the allegations contained in paragraph III of the bill, except the allegations contained in the second subdivision of subparagraph (4), which allegations United States says are irrelevant, incompetent, and immaterial to any issue which may be properly raised in this suit; and except the statement in subparagraph (9) that the rates prescribed by said Commission were required to be established on or before February 21, 1933, with respect to which allegation United States alleges that said Commission has now extended the effective date of its said order to April 22, 1933.

III

United States denies the allegations contained in paragraph IV of the bill, except that it admits the allegation made in part in the first sentence thereof that plaintiffs now participate in joint through all-rail carload rates on cotton from points of origin in Arkansas and Tennessee to destinations in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

Further answering subparagraph (2) of said paragraph IV, United States denies that this court has jurisdiction to determine

the question whether the rail-barge-rail rates and the barge-rail-rates therein mentioned are "fairly or reasonably related to all-rail rates on cotton", and says that the question thereby raised is purely administrative and not judicial.

IV

Answering paragraph V of the bill, United States admits that the allegations of subparagraph (1) thereof are true.

Answering subparagraph (2) thereof, United States denies that the Commission was without jurisdiction, power, or authority
47 to make and enter its said second supplemental report and order; admits that the Commission refused to grant a hearing to plaintiffs prior to the making and entering of said report and order; but alleges that said Inland Waterways Corporation Act, under which the Commission acted in making said report and order, required the Commission to act promptly in the establishment of joint through rates and without having granted a hearing to plaintiffs or other parties prior to the issuance of its order establishing such rates.

For answer to subparagraph (3) of said paragraph V, United States says that it is without knowledge as to what testimony plaintiffs would have offered had they been granted the hearing sought by them prior to the issuance of the Commission's said order, and as to the allegations of said subparagraph (3), it neither admits nor denies.

V

United States denies the allegations contained in paragraph VI of the bill.

VI

Answering paragraph VII of the bill, United States admits the allegations of subparagraph (1) thereof, and denies the allegations of subparagraph (2) of said paragraph VII.

VII

United States denies each and every allegation made and contained in paragraphs VIII, IX, X, and XI of the bill, and particularly denies the allegation in said paragraph XI that enforcement
48 of the Commission's said order will result in irreparable injury or any other legal damage to plaintiffs. Further answering said paragraph XI, United States alleges that the Commission has now extended to April 22, 1933, the time within which the rates and routes prescribed by its said order must be established.

VIII

Further and affirmatively answering the bill of complaint, United States alleges that the Commission was fully authorized and em-

power by said act to make and enter its said order; that in making and entering said order the Commission did not act unreasonably, arbitrarily, or otherwise in excess of or contrary to the powers reposed in it by said act; that the Commission properly construed said act to require that it proceed by order to prescribe and establish through routes and joint through rates without having accorded the plaintiffs or other interested parties an opportunity to be heard prior to the issuance of said order; that although said act requires the Commission to establish through routes and joint rates, by order, without prior hearing, said act expressly authorizes the Commission, upon complaint, at once, and without answer or other form of pleading by interested carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of the through routes or joint rates filed pursuant to such order, or (2) the reasonableness of any minimum differentials between all-rail rates and joint rates in connection with any water service, or (3) the reasonableness of any division of the joint rates so ordered by the Commission, and that after
49 full hearings the Commission may make such order with reference to any such matters as it may find to be proper and in the public interest; that plaintiffs' petition to the Commission for prior hearing was denied by the Commission subject to the express proviso "that the action herein is without prejudice to respondents' right to a summary hearing concerning the reasonableness of the through routes, joint rates, and minimum differentials prescribed in the order of March 11, 1932, in said proceeding, as amended by said order of December 10, 1932, upon complaint filed as authorized by the Inland Waterways Corporation Act"; that plaintiffs have neglected and failed to file such complaint, and have not requested the Commission for a hearing, as provided by said act, concerning the reasonableness of the through routes, joint rates, and minimum differentials prescribed by said order.

IX

Except as herein expressly admitted, United States denies each and every allegation made and contained in the bill of complaint and in the several separate paragraphs and subdivisions thereof.

X

For a further and separate defense United States avers that this suit is prematurely brought, and that plaintiffs are not entitled to maintain it for the reason that they have not filed a complaint or requested a hearing by the Commission, as provided by said act, concerning the reasonableness of the through routes,
50 joint rates, and minimum differentials prescribed by said order, and have, therefore, failed and neglected to avail themselves of, and to exhaust the administrative remedies expressly

provided by, said act; and that until they have conformed to the procedure expressly provided by said act, and have exhausted the remedies before the Commission expressly provided by said act, plaintiffs are without right to maintain this suit.

Wherefore, having fully answered the bill of complaint, United States prays that the relief therein prayed be denied and the bill of complaint dismissed with costs to the plaintiffs, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

(Sgd.) ELMER B. COLLINS,
Special Assistant to the Attorney General.

(Sgd.) LEONARD E. WALES,
United States Attorney.

51 [*Duly sworn to by Elmer B. Collins, jurat omitted in printing.*]

[File endorsement omitted.]

52 In United States District Court

[Title omitted.]

Answer of Interstate Commerce Commission

Filed February 21, 1933

The Interstate Commerce Commission, one of the defendants herein, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exceptions to the many errors and insufficiencies in the plaintiffs' bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs numbered I and II of said bill of complaint, the Commission admits that the allegations therein contained are true except that in respect of the allegation in subpara-
53 graph numbered 3 of paragraph I, it avers that it is charged with the enforcement of certain but not of all the provisions of the Inland Waterways Corporation Act.

II

Answering paragraph III of said bill, the Commission admits the filing with it of the applications by the American Barge Line Company and the making and issuing by the Commission of the reports and orders as alleged in subparagraphs numbered 1, 2, and 3,

except that it avers that the application referred to in subparagraph 1 was filed with the Commission, March 20, 1931, and not March 21, 1931, as alleged. The Commission avers that in its said reports and orders it set forth its finding, conclusions, and requirements and the Commission respectfully refers the court to said reports and orders, a copy of each of which is attached to and made a part of this answer as exhibits A and B, for full and precise information as to its statements, findings, and conclusions in the premises.

The Commission admits the allegations contained in subparagraphs numbered 4, 5, and 6 of said paragraph III, except that it is uncertain as to the meaning of the allegation in subparagraph 4 that the any-quantity rail rates on cotton were normal rates, and therefore neither admits nor denies that allegation; if, however, such allegation is to be taken and understood to aver that such rates so applied were reasonable rates, it admits the same.

Answering subparagraph numbered 7, the Commission admits that certain papers or documents were filed with it on the dates specified by plaintiffs and other rail carriers, but avers that each of said papers or documents was designated as a reply to the petitions
54 of the American Barge Line Company and request for hearing upon said petitions; that with respect to the allegations as to the representations and request made therein, it submits that the said papers or documents are the best evidence thereof; and that the allegations with respect to the contents thereof are conclusions to which it is not required to make answer; it further avers that said allegations are not completely accurate.

In answer to the allegation contained in subparagraph numbered 8, the Commission admits the allegation thereof, but concerning its refusal to grant a hearing on the applications specified therein, of the American Barge Line Company, the Commission avers that as is shown in its report, copy of which is made exhibit A to the bill of complaint, in so declining to allow a hearing and the introduction of evidence it proceeded in strict accordance with the provisions of the applicable statute, namely, section 3 (e) of the Inland Waterways Corporation Act, as amended by the so-called Denison Act, U.S. Code, tit. 49, c. 5, sec. 153 (e); that said section does not provide for a hearing upon an application such as those presented by the American Barge Line Company, prior to consideration or the allowance thereof by the Commission; that the action of the Commission in denying a hearing was consistent with the established and consistently maintained practice of the Commission in such cases based upon its ruling and report, dated November 12, 1928, Ex Parte 94, in a proceeding styled Procedure under Barge Line Act, reported in 148 I.C.C. 129; that the said practice of the Commission was not only required by the plain terms of the statute but was consistent with the intent, plan, and purpose of the Congress of the United States in the enactment of said section.

55 With respect to the allegation that the Commission acted upon the unverified petitions of the American Barge Line

Company, the Commission avers that neither the statute nor the particular applicable rule of practice of the Commission, rule XVIII-A, requires or provides that such application be verified. Further answering, it alleges that there was neither a challenge of the statements of fact made in said applications nor a charge that the facts therein set forth were untrue, made by plaintiffs herein.

Answering subparagraph numbered 9, the Commission admits that the allegations therein contained are true, but avers that subsequent to the time specified therein and on February 2, 1933, it entered an order further postponing until April 22, 1933, the effective date of its order of December 10, 1932.

Answering subparagraph numbered 10, the Commission admits the allegations therein contained, but in this connection avers and shows to the court that its order of January 18, 1933, denying the petitions of the so-called "southwestern" carriers, contained a proviso that the action was without prejudice to the petitioners' right to a summary hearing concerning the reasonableness of the through routes, joint rates, and minimum differentials prescribed by its previous orders, upon complaint filed as authorized by the Inland Waterways Corporation Act. A copy of said order is herewith attached marked exhibit C and made a part of this answer.

III

Answering paragraph IV of the said bill of complaint, the Commission denies the allegations therein contained, except the
56 allegation contained in subparagraph numbered 1 thereof that plaintiffs now participate in joint through all-rail carload rates on cotton from origin to destination points as stated, which allegation it admits.

IV

Answering paragraph V of the bill of complaint, the Commission submits that subparagraph 1 thereof is a repetition of allegations contained in subparagraph numbered 8 of paragraph III of said bill, and therefore the Commission refers to and incorporates by reference here as answer to this subparagraph, the averments set forth in paragraph II of this answer with respect to said subparagraph numbered 8.

The Commission denies the allegations of subparagraph numbered 2 of said paragraph V that it was without authority, power, or jurisdiction to enter its second supplemental order for the reasons set forth in said subparagraph or for any other reason or reasons. On the contrary, it submits and alleges that prior to the making and issuing of its second supplemental report and order, dated December 10, 1932, it carefully weighed each fact set forth in the said petitions in the light of its own knowledge and experience; and as shown in its report gave consideration to contentions advanced by the plaintiffs herein in their "reply" to the applications

of the American Barge Line Company, as well as to protests and communications of others; that said order was not entered without facts to support it; that in the making of said order the Commission did not exceed the authority which had been duly, validly, and lawfully conferred upon it; and that in making said order the Commission proceeded in strict and full conformity to the plain
57 and express terms of the applicable law. The Commission further alleges that under said law the plaintiffs herein were not entitled to a hearing upon the matters and things covered by the said petitions, prior to the allowance thereof, nor until the through routes and joint rates prescribed therein had been filed in compliance with said order.

The Commission further alleges that the plaintiffs herein did not proceed either in accordance with, or as required by, the statute, in that they did not file and have not filed a complaint attacking either the lawfulness or reasonableness of the through routes or rates, or any of them, or of the reasonableness of any minimum differentials between all-rail rates and joint rates in connection with any water service or the reasonableness of any division of joint rates, whereas the statute requires the filing of a complaint as a prerequisite to a hearing, and provides for a hearing only on the particular matters as specified therein.

For answer to subparagraph numbered 3 of said paragraph, the Commission submits that the allegations therein present merely a conclusion of law, and in addition are speculative and an answer thereto is not required; that the Commission is without knowledge or information as to what would have been proved had a hearing been had as requested by plaintiffs; therefore it denies the allegations, and it also denies that all the matters set forth in said subparagraph would be material in such a hearing.

V.

Answering paragraph VII of the bill of complaint, the Commission admits the allegations contained in subparagraph 1 thereof and denies the allegations contained in subparagraph 2 thereof.

58

VI

Answering paragraphs VI, and VIII to X, inclusive, of the bill of complaint, the Commission denies each and every allegation therein contained and avers that its said second supplemental report and order were and are valid; that said report and order were made pursuant to and in due and strict conformity to the power and authority validly conferred upon it by the Congress; that in making and issuing the said report and order, it did not exceed the power and authority so conferred; and that said report and order were not made improvidently or arbitrarily or without facts to support them. It further alleges that in the application of the statute under the

authority of which the Commission entered its said report and order, the Commission followed and observed the mandate and provisions of said statute and proceeded in full accordance therewith. That in so acting and proceeding there was no misconstruction or misinterpretation or misapplication of the statute.

The Commission particularly denies that the enforcement of its second supplemental report and order takes or will take the property of plaintiffs or any of them without due process of law in violation of any of the provisions of the Constitution of the United States, as in paragraph VI alleged, and it further denies that the section 3 (e) of the Inland Waterways Corporation Act, as amended, in itself or as interpreted or applied by the Commission, is void as contravening said Constitution for the reasons stated in paragraphs IX and X, or otherwise. On the contrary, it avers that in and by said section 3 (e) the constitutional rights of plaintiffs and all others coming within its terms, are safeguarded and secured by virtue
59 of particular provisions thereof which confer authority upon the Commission to enter upon a hearing if and when complaint as specified therein is made to it in the manner prescribed: that plaintiffs have refused and neglected to follow the procedure prescribed in, and contemplated by, the said section.

VII

Answering paragraph XI of said bill of complaint, the Commission admits that its second supplemental order requires compliance therewith as specified except as to the effective date thereof and in that regard it avers that the effective date of said order has now been extended to April 22, 1933. The Commission denies each of and all the other allegations in said paragraph contained.

For a further and separate defense the Commission avers that the said plaintiffs are not entitled to maintain this suit in that they have failed to exhaust their remedy before the Commission, for that, by the applicable law, provision is made for a hearing upon the filing of a complaint when the joint-rate schedules are filed as required by the Commission's order; that upon so filing the plaintiffs may obtain the benefit of such provision and be accorded a hearing; that until they have conformed to the statute, they have no standing to maintain this suit.

All of which matters the Commission is ready to aver, maintain, and prove as this honorable court may direct. Wherefore,
60 having made full and complete answer, the Commission prays that the bill of complaint be dismissed at plaintiffs' cost.

INTERSTATE COMMERCE COMMISSION,
By (Sgd.) H. L. UNDERWOOD, *Attorney.*
(Sgd.) DANIEL W. KNOWLTON,
Chief Counsel. Of Counsel.

[*Duly sworn to by Joseph B. Eastman, jurat omitted in printing.*]

61 *Exhibit "A" to answer of I.C.C.*

17608

Interstate Commerce Commission

Ex Parte No. 102

Application of American Barge Line Company

Submitted December 30, 1931. Decided March 11, 1932

1. Certificate of public convenience and necessity granted to the American Barge Line Company covering operation by it upon the Ohio River between Pittsburgh, Pa., and Cairo, Ill., including intermediate ports, and between Pittsburgh, on the one hand, and ports on the Mississippi River south of Cairo, on the other hand.
2. Through routes and joint rates on classes and commodities between certain points in official territory, on the one hand, and certain Ohio and Mississippi River ports and interior points in the Southwest, on the other hand, over applicant's line and connecting rail carriers via specified ports of interchange, required.

Cornelius Lynde and Andrew P. Calhoun for applicant.

Phil G. Safford for Mississippi Valley Barge Line Company; Charles Donley for Union Barge Line Corporation.

L. P. Day and Herbert S. Harr for rail carriers in central, trunk-line, and New England territories; Walter J. Kelly for rail carriers in central territory; W. N. McGehee for Southern Railway system lines.

A. J. Benson, J. M. Morris, R. H. Reese, M. C. Richards, W. H. Welsh, Fred W. Haas, and M. C. Lysle for various shippers and commercial organizations

Report of the Commission

Division 4, Commissioners Meyer, Eastman, and Mahaffie

By Division 4:

The American Barge Line Company, a corporation organized under the laws of Delaware, is engaged in transportation as a common carrier by water on the Ohio and Mississippi Rivers, operating between points in the Pittsburgh, Pa., district [1] and New Orleans, La., and also receiving or delivering freight at certain intermediate points. By application filed March 20, 1931, as amended, it seeks,

[1] Including Pittsburgh, Glassport, Aliquippa, and Ambridge, Pa. Additional terminals are under development at Colona and Conway, Pa., and will be available to applicant. The term "Pittsburgh" as hereinafter used will be understood to embrace all of the above terminals.

under the provisions of section 3 (e) of the Inland Waterways Corporation Act, as amended May 29, 1928, by the so-called
61 Denison Act, a certificate of public convenience and necessity covering such waterway operations between Pittsburgh and New Orleans, including the movement of traffic to and from all intermediate ports, and the establishment, on all classes and commodities suitable for river transportation, of through barge-rail and rail-barge-rail rates in connection with such river transportation via specified ports of interchange.

Copies of the application were sent to the governors and public-service commissions of the States bordering the above water route, to interested rail carriers, and to the Inland Waterways Corporation, and the Mississippi Valley Barge Line Company, with which water lines the applicant will to some extent compete. Notice of the application was also caused to be published in newspapers of general circulation in the above States. In a sworn return to a questionnaire from us applicant submitted data in support of the application. Neither the State authorities nor the competing water lines offered any objection to the application but comments in general opposition thereto were filed by rail carriers in official and southwestern territories. Hearing on the application was had solely on the question of whether the applicant is entitled to the certificate sought with respect to the waterway operations involved. Rail carriers in official and southern territories appeared at the hearing, or on brief, in opposition to the granting of the certificate.

The applicant was incorporated November 29, 1927, and is authorized by its charter to engage in general transportation by water. It has a fully paid up capital of $2,000,000. It owns terminal facilities at Glassport, Louisville, Ky., and Memphis, Tenn., has a financial interest in terminal facilities at Evansville, Ind., and uses the public dock facilities at New Orleans. Other terminals owned by other water carriers or by industries or rail carriers are available for applicant's use in connection with the through water-and-rail rates which it seeks to have established. It owns 8 tow boats and 69 steel barges, with a total fleet capacity of approximately 40,000 tons. Its approximate investment in terminal facilities is $380,000 and in floating equipment $1,900,000. It transported approximately 400,000 tons in 1929, 300,000 tons in 1930, and 251,000 tons in the first 10 months of 1931. It now has, and since its organization has had, a limited number of joint barge-rail rates obtained through negotiations with rail carriers, and between April 30, 1925, and the date of its organization similar joint rates were in force in connection with one or the other of two companies which were consolidated to form the applicant. Some 100 shippers have availed themselves of the service offered under such rates. Of the total tonnage for
1929 and 1930, approximately 32,350 tons were transported
63 under the limited number of joint barge-rail rates applying via Joppa, Ill., or Memphis as ports of interchange. The balance of the tonnage consisted of port-to-port traffic in common-car-

rier service or under contract. The amount of traffic which will move under the joint rates sought is estimated by applicant at 50,000 tons the first year, 100,000 tons the second year, and 300,000 tons the third year. Applicant's running time is estimated at 8 to 14 days from Pittsburgh to Memphis and 12 to 16 days in the opposite direction; at 5 to 7 days from Memphis to New Orleans and 10 to 15 days in the opposite direction.

Applicant furnishes the only common-carrier water service on that portion of the Ohio River between Pittsburgh and Cincinnati, Ohio. It competes with the Mississippi Valley Barge Line Company between Cincinnati and New Orleans and with the Federal Barge Lines between Cairo, Ill., and New Orleans. Both of these competing water lines, to which certificates under the Denison Act have previously been granted, favor the granting of the certificate. For several years the Federal Barge Lines have maintained joint relationships with applicant as to towing service on the Mississippi River and as to joint-haul water rates. A representative of the Mississippi Valley Barge Line Company suggested the possibility of similar joint arrangements between that carrier and the applicant to their mutual advantage. He also testified, in substance, that while, dependent on the service available at time of shipment, some traffic might be diverted from the Mississippi Valley Barge Line to the applicant's line, the converse would also be true, and that the additional service to the public which would result, including service via that portion of the Ohio River over which the applicant furnishes the only common-carrier service, would tend to encourage and develop the movement of traffic over the water route, including traffic which might not move under higher all-rail rates, but the witness did not specify the traffic which he had in mind in this statement.

The opposing rail carriers state that their facilities are more than adequate to handle all traffic offered for shipment between points which would be affected by the application and stress the adverse effects on their already diminished traffic and earnings which they claim will result from the differential joint rail-and-water rates which would be required to be established if the certificate were granted. These representations are similar to those made by rail carriers in other proceedings of this nature and which we have found not to be such as to warrant the withholding of a certificate to a water line otherwise entitled thereto. Application of Mississippi Valley B. L. Co., 167 I.C.C. 41; 178 I.C.C. 224. Under the Denison Act the establishment of appropriate joint rail-and-water
64 rates, when and if a certificate is granted, flows from the mandate of the statute. The possible effects of such establishment in depriving rail carriers of some traffic and earnings which they otherwise might continue to hold to their lines is a matter of policy which the Congress must be presumed to have taken into consideration in the enactment of the statute and is not a matter which we are authorized to consider in determining whether, solely with respect

to the waterway operations involved, the applicant is entitled to the certificate sought.

In Procedure under Barge Line Act, 148 I.C.C. 129, 135, we held that the waterway operations of the Inland Waterways Corporation, herein referred to as the Federal Barge Lines having been specifically provided for by the Denison Act, the question of public convenience and necessity with respect to such operations was foreclosed by law. In the case of a private barge line, such as the applicant, no such conclusive presumption attaches, but the question of public convenience and necessity must be determined upon a consideration of all the facts and circumstances. The opposing rail carriers point to this distinction and contend that there has been no such showing of public convenience and necessity as would warrant the granting of the certificate. Their contention is based on the theory that in determining the question of public convenience and necessity under the Denison Act the same considerations control as in the case of the construction of a new line of railroad in competition with an existing line of railroad which furnishes adequate service between the points involved, under which circumstances certificates of public convenience and necessity have frequently been denied. We adhere to the conclusion announced in Application of Mississippi Valley B. L. Co., 147 I.C.C. 41, 43, that such an interpretation of the Denison Act is too narrow. The rail carriers' contention that that conclusion was supported only by earlier decisions under the interstate commerce act which are not controlling in construing the provisions of the Denison Act is not a valid one. That conclusion was specifically based upon the provisions of the Denison Act. Furthermore, the issue of public convenience and necessity is one to be determined solely with respect to the waterway operations in question. In addition to furnishing the only common-carrier water service between Pittsburgh and Cincinnati the applicant will furnish the only through common-carrier water service between Pittsburgh, on the one hand, and Ohio and Mississippi River ports west of Cincinnati and south of Cairo, on the other hand. The Government has expended many millions of dollars in improving and developing those waterways with a view to making them adequate for reasonably dependable and regular transportation service and it would clearly be inconsistent with the purpose and intent of the Denison Act to
65 deny to the applicant a certificate covering such operations as those above described. Giving significance and effect to the entire statute, the record also warrants the conclusion that service by the applicant, in addition to the Mississippi Valley Barge Line, on that portion of the Ohio River west of Cincinnati is necessary and desirable in the public interest. The record is not convincing, however, that public convenience and necessity require operation by the applicant between Cairo, on the one hand, and Mississippi River ports south thereof, on the other hand, which portion of the Mississippi River is now served both by the Federal Barge Lines and

the Mississippi Valley Barge Line, nor are the joint rates sought by applicant conditioned on a certificate covering such operation.

Through Routes and Joint Rates

Applicant has outlined its proposal concerning through routes and joint rates in its return to our questionnaire and all interested parties have been given an opportunity to file written comments thereon.

Applicant seeks the establishment between groups specified in the footnote [2] of through barge-rail [3] and rail-barge-rail rates as follows:

Between—	And—	Port or ports of interchange with rail carriers
Barge-rail:		
Group 1	Cincinnati, Ohio, Louisville, Ky., Evansville, Ind., Memphis, Tenn., Helena, Ark., Vicksburg, Miss., Baton Rouge, and New Orleans, La.	Pittsburgh.
Group 2	Memphis, Helena, Vicksburg, Baton Rouge, and New Orleans.	Louisville.
Group 3	Memphis, Helena, Vicksburg, Baton Rouge, and New Orleans.	Evansville.
Rail-barge-rail:		
Group 1	Group 4	Pittsburgh and Memphis.
Do	Group 6	Pittsburgh and New Orleans.
Group 2	Group 5	Louisville and Memphis.
Do	Group 6	Louisville and New Orleans.
Group 3	Group 5	Evansville and Memphis.
Do	Group 6	Evansville and New Orleans.

Rates based upon a minimum differential of 20 percent of the port-to-port rail rates are sought over such routes.

66 In Ex parte No. 96, Through Routes and Joint Rates, 153 I.C.C. 129, a proceeding similar to this and involving the Federal Barge Line, we provided for the establishment of through routes and joint rates subject to certain circuity and other limitations. Those limitations as subsequently modified are embodied in the findings in our fifth supplemental report in that proceeding, 172 I.C.C. 525. No through routes in connection with the barge line were required to be established where the shortest all-rail distance from point of origin to point of destination through the port or ports of interchange exceeded the shortest all-rail distance from the point of origin to point of destination by more than 40 percent in the case of barge-rail routes, and by more than 33⅓ percent in the case of rail-barge-rail routes, nor where the rail portions of such routes exceeded 75 percent, in the case of barge-rail, and 66⅔ percent

[2] Group 1, Pennsylvania, New York, New Jersey, Connecticut, Massachusetts, Rhode Island, and Ohio east of and including stations on Pittsburgh & Lake Erie, Pittsburgh to Youngstown, Erie Railroad, Youngstown to Cleveland, inclusive.

Group 2, Indiana, Michigan, and Ohio west of and including stations on Pittsburgh & Lake Erie, Pittsburgh to Youngstown, Erie Railroad, Youngstown to Cleveland.

Group 3, Indiana, Wisconsin, Illinois, Michigan, and Ohio west of and including stations on the Cleveland, Cincinnati, Chicago & St. Louis Railway, Indianapolis to Toledo via Bellefontaine.

Group 4, all stations in S. W. L. tariff 161, I.C.C. No. 2148.

Group 5, Arkansas and Oklahoma.

Group 6, Texas and Louisiana.

[3] This term as herein used includes also rail-barge.

in case of rail-barge-rail routes. For the establishment of joint rates over the through routes provided for, two bases of differentials were prescribed, namely, 20 percent of the corresponding all-rail rate between the ports where certain limitations [4] as to circuity and the like were not exceeded, and 10 percent of that rate where those limitations were exceeded.

In Application of Mississippi Valley B. L. Co., 167 I. C. C. 41, the water line desired only one basis of differentials as applied to its Cincinnati-New Orleans route, and as that basis was in general not very different from the 20 percent basis prescribed for the Federal Barge Lines, we adopted the more restrictive limitations which had been prescribed in the case of the latter basis. The limitations were subsequently made slightly less restrictive, but no different in principle, in recognition of the fact that the above uniform differential basis was somewhat lower than the 20 percent basis, 171 I.C.C. 37. In the case of additional routes covered by the second supplemental report in that proceeding, 178 I.C.C. 225, both the 20 percent and 10 percent bases of differentials were provided for in accordance with the so-called Ex parte 96 formula.

Considering the situation as between points said by applicant to be representative of its proposed group adjustment, it appears that some of the routes sought would not be required under the Ex parte 96 formula, as for example, from Cleveland, Ohio, (group 1) to Alexandria, La., (group 6) via rail to Pittsburgh, applicant's line
67 from Pittsburgh to New Orleans, and rail beyond, because the distance from Cleveland to Alexandria via the ports of interchange (1,461 miles) exceeds the short all-rail distance from Cleveland to Alexandria (1,067 miles) by more than one third. In numerous other instances the application of the above formula, while providing for the establishment of the through routes sought, would require the joint rates to be based upon a minimum differential of 10 percent of the port-to-port rail rates instead of 20 percent as sought by applicant.

Applicant urges that the group adjustment suggested by it is reasonably necessary in order to place competing shippers upon a substantial parity and that the 20 percent differential basis as applied to traffic between such groups is no more than sufficient to attract a reasonable share of the traffic to the rail-and-water routes sought; that these groups are to be served through ports which call for a substantially direct movement of traffic from point of origin to point of destination; that it is prepared to allow the rail carriers established all-rail divisions to and from the ports of interchange subject to the right to object to any specific division which seems to have

[4] Viz, where the shortest all-rail distance from point of origin to point of destination through the port or ports of interchange does not exceed the shortest all-rail distance from point of origin to point of destination by more than 20 percent, or where the rail portions of such routes do not exceed two thirds of the shortest all-rail distance in the case of barge-rail routes or one half of the shortest all-rail distance in case of rail-barge-rail routes.

been made without reasonable regard to transportation conditions; that self-interest alone, therefore, is sufficient to prevent the applicant from seeking such an ill-adjusted combination of rail-and-water service as would not require a reasonably large portion thereof to be performed by applicant; and that in view of the foregoing considerations, there is no occasion or necessity for imposing in this case such circuity and other limitations as those imposed in Ex parte 96 and similar proceedings.

The grounds urged by applicant in support of its proposed group adjustment, with a uniform differential of 20 percent of the all-rail rates between the ports and without regard to circuity limitations, have been fully considered but are not such as in our opinion to warrant us in imposing upon the rail carriers such a broad requirement as that sought, even though it may be, as claimed by applicant, that the through routes sought do not reflect any greater degree of circuity than that obtaining as between some competing all-rail routes voluntarily established by rail carriers.

The rail carriers in their comments contend that we should not require that the scope of the origin and destination territory be made any greater than would result from the application of the Ex parte 96 formula and that no greater differentials under the all-rail rates should be prescribed than were prescribed in the original and first supplemental report in Application of Mississippi Valley B. L. Co., supra, or than are warranted by comparative costs of transportation, to be determined upon a hearing, over the through rail-and-water route and the all-rail route between the same origin and destination. Under our interpretation of the Denison Act no hearing is contemplated with respect to the matter of the routes and rates which we are authorized to require in a proceeding under that statute.

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In the case of the competing barge lines, the Federal and the Mississippi Valley, we have not required the rail carriers to participate in through routes and joint rates with those water carriers beyond the limitations of the Ex parte 96 formula or beyond those limitations in principle, and no good reason appears why the limitations of that formula should not be prescribed in this proceeding, subject as therein provided, to the use of origin or destination groups if the parties so agree.

In the foregoing discussion of the Ex parte 96 formula we have had in mind its application in connection with routes to, from, or via ports on the lower Mississippi River. We have not heretofore had occasion to consider use of this formula where the water service is performed entirely on the Ohio River. As has been pointed out in other reports, that formula was prescribed in its present form without the aid of a record and was based largely on the scheme for joint rates which had been determined for the Federal Barge Lines by the railroad administration when it was in control of the barge line as well as the rail carriers. As privately owned barge lines have

come into operation on the lower Mississippi in the last few years, it has been a natural development that their rail-barge and rail-barge-rail rates have largely been based on the Ex parte 96 formula. It should be pointed out, however, that we have not used that formula exclusively in fixing rates for the Federal Barge Lines and their rail connections, a notable exception being the decision in Sugar from Louisiana to Arkansas, 167 I.C.C. 710, where we prescribed rates based on constructive distances between barge-line ports.

The Federal Barge Lines are not authorized by law to operate on the Ohio River, and there is as yet no general system of rail-barge rates in effect only via ports on that river. The rates here sought via those ports would be related to the rail rates prevailing in official territory, whereas those previously established on the lower Mississippi have been related to the southern and the southwestern rates. There have long been differential ocean-rail and rail-lake rates between portions of eastern and New England territories on the one hand and certain points in central territory on the other hand, but those rates bear no resemblance to rates produced by the Ex parte 96 formula. The ocean carriers interested in those rates have indicated some apprehension concerning the rail-barge rates to be established to and from central territory, and the situation seems to call for caution in determining a comprehensive system of
68a rail-barge rates for this territory without a record, as we are here required to do. On the whole, it seems preferable not to use the Ex parte 96 formula in making rates via Ohio River ports but to adopt a plan based on constructive mileages akin to that followed in Sugar from Louisiana to Arkansas, supra. Constructive mileages, arrived at in a manner similar to that outlined in the report last cited, which we deem fair for this purpose, are as follows: Pittsburgh-Cincinnati 180 miles, Pittsburgh-Louisville 270 miles, Pittsburgh-Evansville 350 miles.

1. We find that the present and future public convenience and necessity require operation of the American Barge Line Company as a common carrier upon the Ohio River between Pittsburgh and Cairo, including intermediate ports, and between Pittsburgh, on the one hand, and ports on the Mississippi River south of Cairo, on the other hand, but do not require operation by the applicant locally between Cairo, on the one hand, and Mississippi River ports south thereof, on the other hand.

2. We further find that the connecting common carriers by rail listed in the appendix, and their rail connections, should be required to establish, in connection with the American Barge Line Company through routes on classes and commodities as follows: Barge-rail routes between points in the territory included in groups 1, 2, and 3 as described in this report, on the one hand, and lower Mississippi River ports (Memphis, Helena, Vicksburg, Baton Rouge, and New Orleans), on the other hand, via Ohio River ports of interchange (Pittsburgh, Louisville, or Evansville) and rail-barge-rail routes between points in the territory included in said groups 1, 2, and 3, on

the one hand, and points in the territory included in groups 4, 5, and 6, as described in this report, on the other hand, via Ohio River ports of interchange (Pittsburgh, Louisville, or Evansville), on the one hand, and lower Mississippi River ports of interchange (Memphis or New Orleans), on the other hand, except that (a) no barge-rail route need be established where the shortest all-rail distance via the lines of the said rail carriers from point of origin to point of desination through the port of interchange with the barge line exceeds by more than 40 per cent the shortest all-rail distance between such points of origin and destination; (b) no rail-barge-rail route need be established where the shortest all-rail distance from point of origin to point of destination through the ports of interchange with the barge line exceeds by more than 33⅓ per cent the shortest all-rail distance between such points of origin and destination; (c) no barge-rail route need be established where the shortest all-rail distance between the inland point of origin or destination, as the case may be, and the port of interchange exceeds three fourths of the shortest all-rail distance between point of origin and point of destination; (d) no rail-barge-rail route need be established where the sum of the shortest all-rail distance from the point of origin to the port of interchange where the shipment is delivered to the barge line, plus the shortest all-rail distance from the port of interchange where the shipment is relinquished by the barge line to the point of destination, exceeds two thirds of the shortest all-rail distance between origin and destination; (e) no barge-rail or rail-barge-rail route need be established except over the shortest "working" route (i.e., the shortest route regularly used for the transportation of freight traffic in general) between the inland point of origin or destination, as the case may be, and the port of interchange over which the lowest corresponding rate between such points applies; and (f) no barge-rail or rail-barge-rail route need be established if the barge line and the interested rail carriers agree that it shall not be established. In the determination of such through routes, origin or destination groups may be used, if the parties so agree, and in that event distances shall be figured from or to a point centrally located within the group.

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3. We further find that over each of the through routes required in finding 2 said common carriers by rail in connection with the American Barge Line Company shall establish joint rates on all classes and commodities constructed by deducting from the lowest all-rail rate contemporaneously applied on corresponding traffic by said common carriers by rail between point of origin and point of destination via any route the following differentials, which we find to be reasonable minimum differentials: (1) Where, in applying the provisions of finding 2, the excess under (a) is not more than 20 per cent and the fraction under (c) is not greater than two thirds, and where the excess under (b) is not more than 20 percent and the fraction under (d) is not more than one half, 20 percent of the lowest

corresponding all-rail rate between the ports between which the shipment is transported by the barge line; and (2) in all other cases, 10 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by the barge line: provided, however, that no such joint commodity rate need be established where the corresponding all-rail rate over the direct route from or to an interior point to or from a port of destination or origin involves at intermediate points departures from the long-and-short haul provision of the fourth section of the interstate commerce act, nor if the barge line and the interested rail carriers agree that no such joint commodity rate shall be established; and provided further, that no joint barge-rail or rail-barge-rail rate established under our order herein from or to any given point of origin
70 or destination need be lower than the corresponding all-rail rate between such point of origin or destination and the port of interchange. It should be understood that if the all-rail rates on classes other than first or on commodities are determined by applying percentages to the corresponding first-class rates, the joint rates prescribed in this section may be determined by first ascertaining the barge-rail or rail-barge-rail first-class rate, as the case may be, and applying the appropriate percentage thereto.

4. We further find that the connecting common carriers by rail listed in the appendix, and their rail connections, should be required to establish, in connection with the American Barge Line through barge-rail routes on classes and commodities between points in the territory included in group 1, as hereinbefore described, and Ohio River ports (Cincinnati, Louisville, and Evansville) via Pittsburgh: that over each of the through routes required in this finding said common carriers by rail in connection with the American Barge Line Company shall establish joint class rates based on the distance scale and arbitraries set forth in appendices E, F, and I to the report in Eastern Class-Rate Investigation, 164 I.C.C. 314, 171 I.C.C. 481, based on distances arrived at by adding to the short-line all-rail distances from the interior points of origin or destination to Pittsburgh the following constructive distances: Pittsburgh-Cincinnati 180 miles, Pittsburgh-Louisville 270 miles, Pittsburgh-Evansville 350 miles, and that over each of the through routes required in this finding said common carriers by rail in connection with the American Barge Line Company shall establish joint commodity rates determined by deducting from the all-rail commodity rates in effect between the same points differentials for the class rate most nearly corresponding to the all-rail commodity rate or the lower of two class rates equally corresponding: Provided, however, That no such joint commodity rate need be established where the corresponding all-rail rate over the direct route from or to an interior point to or from a point of destination or origin involves at intermediate points departures from the long-and-short haul provision of the fourth section of the Interstate Commerce Act, nor if the American Barge Line Company and interested rail carriers agree that no such joint commodity

rate shall be established, and Provided, further, That no rail-barge route need be established except over the shortest "working" route as hereinbefore defined between the inland point of origin (or destination, as the case may be) and Pittsburgh over which the lowest corresponding rate between such points applies, nor in other cases in which the applicant and the interested rail carriers agree that it should not be established.

71 5. We further find that each of the joint rates ordered to be established in the foregoing finding shall be governed by the same classification and exceptions thereto, and insofar as the transportation takes place on the lines of the said rail carriers by the same general and special rules, regulations, and practices as govern, apply, or are available in connection with the all-rail rates from which the differentials above set forth are deducted in constructing such joint rates, except that such rules and provisions shall be modified with respect to the acceptance of freight, packing requirements, and the like, insofar as may be necessary to meet the circumstances and conditions of transportation by barge.

We further find that within 30 days after the joint rates prescribed above become effective, the said common carriers by rail shall enter into negotiations with the American Barge Line Company for the purpose of agreeing upon equitable divisions of such joint rates; and further, at the expiration of 120 days from the date of publication of the said joint rates, the parties shall advise us in writing as to whether agreement has been reached with respect to such divisions, and if not, the parties shall clearly set forth the rates as to which agreement has not been reached, and shall show the divisions thereof which they consider equitable and their reasons therefor.

An appropriate certificate and order will be entered.

Mahaffie, Commissioner, dissenting.

For the reasons stated in my dissenting expression in application of Mississippi Valley B. L. Co., 182 I.C.C. 512, decided concurrently herewith, I am unable to concur in the findings of the majority in this case.

Appendix

Allegheny and South Side Railway; the Baltimore and Ohio Railroad Company; Buffalo, Rochester and Pittsburgh Railway Company; The Chesapeake and Ohio Railway Company; Chicago and Eastern Illinois Railway Company; Chicago, Indianapolis and Louisville Railway Company; The Chicago, Rock Island and Pacific Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Evansville & Ohio Valley Railway Company (William A. Carson, receiver); Evansville, Suburban & Newburgh Railway Company; Illinois Central Railroad Company; Interstate Public Service Company; Kentucky and Indiana Terminal Railroad Company; Louisiana and Arkansas Railway Company;

Louisiana Southern Railway Company; Louisville and Nashville Railroad Company; Missouri and North Arkansas Railway Company (W. Stephenson, receiver); Missouri Pacific Railroad Company; Missouri Pacific Lines; Mobile and Ohio Rail Road Company; The Monongahela Connecting Railroad; The Nashville, Chattanooga & St. Louis Railway; New Orleans and Lower Coast Railroad Company; New Orleans and Northeastern Railroad Company; New
72 Orleans Great Northern Railroad Company; New Orleans Public Belt Railroad; New Orleans Terminal Company; The Pennsylvania Railroad Company; Pittsburgh, Allegheny & McKees Rock Railroad Company; The Pittsburgh and Lake Erie Railroad Company; The Pittsburgh & West Virginia Railway Company; St. Louis-San Francisco Railway Company; St. Louis Southwestern Railway Company; Southern Railway Company; Southern Pacific Company; Texas and New Orleans Railroad Company; Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans; Union Railway Company (Memphis, Tenn.); and the Yazoo and Mississippi Valley Railroad Company.

73

Certificate and Order

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D.C., on the 11th day of March, A.D. 1932

Ex Parte No. 102

Application of American Barge Line Company

Investigation of the matters and things involved in this proceeding having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require the operation of the American Barge Line Company as a common carrier upon the Ohio River between Pittsburgh, Pa. (which term as herein used includes points in the Pittsburgh district named in said report), and Cairo, Ill., including intermediate ports, and between Pittsburgh, on the one hand, and ports on the Mississippi River south of Cairo, Ill., on the other hand.

It is ordered, That the connecting common carriers by rail listed in the appendix and their rail connections be, and they are hereby, directed and required to join with the American Barge Line Company in establishing, on or before June 20, 1932, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, through routes on classes and commodities as follows:

Barge-rail routes between points in the territory included in groups

1, 2, and 3 as described in said report, on the one hand, and lower Mississippi River ports (Memphis, Tenn., Helena, Ark., Vicksburg, Miss., Baton Rouge, La., and New Orleans, La.), on the other hand, via Ohio River ports of interchange (Pittsburgh, Louisville, or Evansville); rail-barge-rail routes between points in the territory included in said groups 1, 2, and 3, on the one hand, and points in the territory included in groups 4, 5, and 6, as described in said report, on the other hand, via Ohio River ports of interchange (Pittsburgh, Louisville, or Evansville), on the one hand, and lower Mississippi River ports of interchange (Memphis or New Orleans), on the other hand: Provided, however, That (a) no such barge-rail route need be established where the shortest all-rail distance via the lines of the said rail carriers from point of origin to point of destination through the port of interchange with said American Barge Line Company exceeds by more than 40 percent the shortest all-rail dis-
74 tance between such points of origin and destinations; (b) no rail-barge-rail route need be established where the shortest all-rail distance from point of origin to point of destination through the ports of interchange with said American Barge Line Company exceeds by more than 33⅓ percent the shortest all-rail distance between such points of origin and destination; (c) no barge-rail route need be established where the shortest all-rail distance between the inland point of origin or destination, as the case may be, and the port of interchange exceeds three fourths of the shortest all-rail distance between point of origin and point of destination; (d) no rail-barge-rail route need be established where the sum of the shortest all-rail distance from the point of origin to the port of interchange where the shipment is delivered to said American Barge Line Company, plus the shortest all-rail distance from the port of interchange where the shipment is relinquished by said American Barge Line Company to the point of destination, exceeds two thirds of the shortest all-rail distance between origin and destination; (e) no barge-rail or rail-barge-rail route need be established except over the shortest "working" route (i.e., the shortest route regularly used for the transportation of freight traffic in general) between the inland point of origin or destination, as the case may be, and the port of interchange over which the lowest corresponding rate between such points applies; and (f) no barge-rail or rail-barge-rail route need be established if said American Barge Line Company and the interested rail carriers agree that it shall not be established.

It is further ordered, That said common carriers by rail, parties to the through routes prescribed in the next preceding paragraph hereof, be, and they are hereby, directed and required to join with said American Barge Line Company in establishing, on or before June 20, 1932, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint rates applicable over said through routes, constructed by deducting from the lowest all-rail rate contemporaneously applicable on correspond-

ing traffic over any route between the same points of origin and destination the following differentials: (a) Where over barge-rail routes the shortest all-rail distance via the lines of the connecting rail carriers from point of origin to point of destination through the port of interchange does not exceed the shortest rail distance between such points of origin and destination by more than 20 percent, where over barge-rail routes the shortest all-rail distance between the inland point of origin or destination and the port of interchange does not exceed two thirds of the shortest all-rail distance, where over rail-barge-rail routes the short all-rail distance from point of
75 origin to point of destination through the port of interchange does not exceed by more than 20 percent the shortest rail distance between such points of origin and destination, and where over rail-barge-rail routes the total rail haul is not more than one half of the shortest all-rail distance between point of origin and destination, 20 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by said American Barge Line Company; and (b) in all other cases, 10 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by said American Barge Line Company: Provided, however, That no such joint commodity rate need be established where the corresponding all-rail rate over the direct route from or to an interior point to or from a port of destination or origin involves at intermediate points departures from the long-and-short-haul provision of the fourth section of the Interstate Commerce Act nor if said American Barge Line Company and the interested rail carriers agree that no such joint commodity rate shall be established: And provided further, That no joint barge-rail or rail-barge-rail rate established under this order from or to any given point of origin or destination need be lower than the corresponding all-rail rate between such point of origin or destination and the port of interchange.

It is further ordered, That the common carriers by rail listed in the appendix and their rail connections be, and they are hereby, directed and required to joint with said American Barge Line Company in establishing, on or before June 20, 1932, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, through routes on classes and commodities between points in the territory included in group 1, as described in said report, on the one hand, and Ohio River ports (Cincinnati, Louisville, and Evansville), on the other hand, via Pittsburgh: Provided, however, That no such route need be established except over the shortest "working" route (i.e., the shortest route regularly used for the transportation of freight traffic in general) between the inland point of origin or destination, as the case may be, and Pittsburgh, nor in other cases in which said American Barge Line Company and interested rail carriers agree that it shall not be established.

It is further ordered, That said common carriers by rail parties to the through routes prescribed in the next preceding paragraph hereof be, and they are hereby, directed and required to join with said American Barge Line Company in establishing on or before June 20, 1932, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint
76 class rates based on the distance scale and arbitraries set forth in Appendixes E, F, and I to the report in Eastern Class-Rate Investigation, 164 I.C.C. 314, 171 I.C.C. 481, for distances determined by adding to the short-line all-rail distances from the interior points of origin or destination to Pittsburgh the following constructive distances: Pittsburgh-Cincinnati 180 miles, Pittsburgh-Louisville 270 miles, Pittsburgh-Evansville 350 miles, and joint commodity rates determined by deducting from the all-rail commodity rates in effect between the same points differentials for the class rates most nearly corresponding to the all-rail commodity rate or the lower of two class rates equally corresponding: Provided, however, That no such joint commodity rate need be established where the corresponding all-rail rate over the direct route from or to an interior point to or from a point of destination or origin involves at intermediate points departures from the long-and-short-haul provisions of the fourth section of the Interstate Commerce Act, nor if the said American Barge Line Company and interested rail carriers agree that no such joint commodity rate shall be established.

It is further ordered, That the joint rates hereinbefore prescribed shall be governed by the same classification and exceptions thereto, and insofar as the transportation takes place on the lines of the rail carriers, by the same general and special rules, regulations, and practices as govern, apply, or are available in connection with the all-rail rate on which the different rates hereinbefore prescribed are based, except that such rules, regulations, and practices shall be modified with respect to the acceptance of freight, packing requirements, and the like, insofar as may be necessary to meet the circumstances and conditions of barge transportation.

It is further ordered, That the interested carriers be, and they are hereby, directed and required within 30 days from the date when the joint rates hereinbefore prescribed become effective to enter into negotiations with said American Barge Line Company for the purpose of establishing equitable divisions of such joint rates, and the said carriers and said American Barge Line Company be, and they are hereby, directed and required to inform the commission within 120 days from date of publication of said rates whether they have been able to agree upon equitable divisions of said rates, and, if they have been unable to agree, to state the divisions which they respectively consider equitable and their reasons therefor.

And it is further ordered, That this order shall continue in effect until the further order of the commission, or until the rates, routes,

regulations, and practices hereinbefore prescribed are changed by agreement of the interested parties.

By the commission, division 4. GEORGE B. McGINTY.
[SEAL.] *Secretary.*

77

Exhibit "B" to answer I.C.C.

17862

Interstate Commerce Commission

Ex Parte No. 102

Application of American Barge Line Company

Decided June 14, 1932

Additional through barge-rail rates and joint rates on classes and commodities over applicant's line and connecting rail carriers required. Prior report, 182 I.C.C. 521.

Supplemental Report of the Commission

Division 4, Commissioners Meyer, Eastman, and Mahaffie

By Division 4:

In our original report of March 11, 1932, herein 182 I.C.C. 521, we granted a certificate of public convenience and necessity to applicant as a water carrier upon the Ohio and Mississippi Rivers between Pittsburgh, Pa., and New Orleans, La., except that the certificate did not cover operation locally between Cairo, Ill., and Mississippi River ports south thereof. We also required the establishment of through routes and joint rates between certain points in official territory, on the one hand, and certain Ohio and Mississippi River ports and interior points in the Southwest, on the other hand, over applicant's line and connecting rail carriers via specified ports of interchange on the Ohio and Mississippi Rivers. No routes and rates were requested by applicant between Ohio River ports and interior points in the Southwest and accordingly none were prescribed.

By petition filed May 17, 1932, applicant seeks the establishment of through rates and joint differential rates on classes and commodities between Ohio River ports (Pittsburgh, Cincinnati, Ohio, Louisville, Ky., and Evansville, Ind.) and points in groups 4, 5, and 6 (comprising certain interior points in the Southwest as described in the original report) via Memphis, Tenn., and New Orleans.

Applicant explains that it inadvertently failed to include such a request in its original application. The interested southwestern carriers were served with copies of the petition. They have submitted no formal comments with respect thereto but correspondence filed in the docket indicates that they are unwilling to join in the

establishment of such routes and rates unless specifically ordered by us.

The rates prescribed in our original report for application to, from, or via lower Mississippi River ports, were based on the
78 so-called Ex parte No. 96 formula described in that report. The use of the same basis appears to be apropriate for determining the additional routes and rates here sought.

We find that the connecting common carriers by rail listed in the appendix to the original report in this proceeding, and their rail connections, should be required to establish, in connection with the American Barge Line Company, through barge-rail routes and joint rates on classes and commodities between Ohio River ports (Pittsburgh, Cincinnati, Louisville, and Evansville) and points in the territory included in groups 4, 5, and 6, as described in the original report, via lower Mississippi River ports of interchange (Memphis and New Orleans), in accordance with the same provisions, and subject to the same exceptions and limitations, as those set forth in the original report and order in connection with the barge-rail through routes and joint rates therein prescribed to, from, and via lower Mississippi River ports.

We further find that within 30 days after the joint rates prescribed above become effective, the said common carriers by rail shall enter into negotiations with the American Barge Line Company for the purpose of agreeing upon equitable divisions of such joint rates; and further, at the expiration of 120 days from the date of publication of the said joint rates, the parties shall advise us in writing as to whether agreement has been reached with respect to such divisions, and if not, the parties shall clearly set forth the rates as to which agreement has not been reached, and shall show the divisions thereof which they consider equitable and their reasons therefor.

An appropriate supplemental order will be entered.

Mahaffie, Commissioner, concurring:

I concur in this report subject to the conditions stated in my separate expression in the original report herein.

79 Supplemental Order

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D.C., on the 14th day of June, A.D. 1932

Ex Parte No. 102

Application of American Barge Line Company

Said division having, on the date hereof, made and filed a supplemental report in the above-entitled proceeding, containing its further findings and conclusions thereon, which said report, together with the original report in 182 I.C.C. 521, is hereby referred to and made a part hereof:

It is ordered, That the connecting common carrier by rail listed in the appendix to said original report, and their rail connections, be, and they are hereby, directed and required to join with the American Barge Line Company in establishing, on or before August 20, 1932, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, through barge-rail routes and joint rates on classes and commodities between Ohio River ports (Pittsburgh, Pa., Cincinnati, Ohio, Louisville, Ky., and Evansville, Ind.) and points in the territory included in groups 4, 5, and 6, as described in said original report, via lower Mississippi River ports of interchange (Memphis, Tenn., and New Orleans, La.) in accordance with the same provisions, and subject to the same exceptions and limitations, as those set forth in the original report and order in connection with barge-rail through routes and joint rates therein prescribed to, from, and via lower Mississippi River ports.

It is further ordered, That the interested carriers be, and they are hereby, directed and required within 30 days from the date when the joint rates hereinbefore prescribed become effective to enter into negotiations with said American Barge Line Company for the purpose of establishing equitable divisions of such joint rates, and the said carriers and said American Barge Line Company be, and they are hereby, directed and required to inform the commission within 120 days from date of publication of said rates whether they have been able to agree upon equitable divisions of said rates, and, if they have been unable to agree, to state the divisions which they respectively consider equitable and their reasons therefor.

80 And it is further ordered, That this order shall continue in effect until the further order of the commission, or until the rates, routes, regulations, and practices hereinbefore prescribed are changed by agreement of the interested parties.

By the commission, division 4.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

81 *Exhibit "C" to answer of I.C.C.*

Order

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 18th day of January, A.D. 1933

Ex Parte No. 102

Application of American Barge Line Company

Upon consideration of a petition of southwestern rail carriers, respondents in the above-entitled proceeding, dated December 30, 1932, praying for vacation of the order of December 10, 1932, in

said proceeding, for reopening, consideration by the entire commission, and hearing, and dismissal of applicant's petitions, and of a petition of said respondents dated January 7, 1933, praying for postponement of the effective date of said order:

It is ordered, That the petition for vacation of order, reopening, hearing, and dismissal, be, and it is hereby denied: Provided, That the action herein is without prejudice to respondents' right to a summary hearing concerning the reasonableness of the through routes, joint rates, and minimum differentials prescribed in the order of March 11, 1932, in said proceeding, as amended by said order of December 10, 1932, upon complaint filed as authorized by the Inland Waterways Corporation Act.

It is further ordered, That the effective date of said order of December 10, 1932, as amended, be, and it is hereby, further postponed until February 21, 1933.

And it is further ordered, That in all other respects said order of December 10, 1932, as amended, shall continue in effect until the further order of the commission.

By the commission.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

82 [File endorsement omitted.]

83 In United States District Court

[Title omitted.]

Petition of Inland Waterways Corporation for leave to intervene as a party defendant

Filed Feb. 27, 1933

To the honorable the Justices of the District Court of the United States for the District of Delaware, holding a court of equity:

This petitioner, the Inland Waterways Corporation, respectfully alleges:

I

That petitioner is a corporation wholly owned by the Federal Government and created under an act of Congress (Public No. 185, Sixty-eighth Cong., 43 Stat. 360–362, 49 U.S.C., sections 151–156), and, as such, petitioner owns and operates Federal barge lines in the business of common carriage of freight on the Mississippi River and certain of its tributaries, on the Industrial Canal, the
84 Mississippi Sound, and the Mobile, the Tombigbee, the Warrior and the Black Warrior Rivers, serving many ports of call on said rivers, each of which ports is also served by one or more common carriers by rail, including many of the plaintiffs herein, and that at each of said ports there exist terminal facilities for the

interchange of freight between the craft of this petitioner and rail carriers.

II

That it has a substantial interest in the subject of the action involved in the above numbered and entitled cause, which interest is adverse to that of the plaintiffs, and it is entitled to intervene in said cause.

III

That under the provisions of sections 2 (e) of the act of Congress approved May 29, 1928 (Public, No. 601, 70th Cong., 45 Stat. 978), amending section 3 of the aforesaid act under which said corporation was created, it has heretofore applied to the Interstate Commerce Commission and has secured from said Commission a certificate of convenience and necessity, as contemplated in said last-mentioned act, together with orders of said Commission requiring each and all of the railroads, plaintiffs herein, and other railroads and their rail connections to join with it in the establishment of through rates in connection with it from and to all points
85 served by them, and requiring all of said common carriers by rail connecting with it and the rail connections of such common carriers to establish joint rates on all classes of commodities applicable over the routes defined by said Commission in said orders, such rates to be constructed by deducting from the lowest all-rail rate contemporaneously applicable on corresponding traffic over any route between the same points of origin and destination differentials as prescribed by the said Commission in said orders. That the initial order of said Commission so affecting this petitioner was entered by said Commission on April 8, 1929, and that, since said date said Commission has entered its various orders substantially of the same nature as those above described so that at the present time a large amount of the business of petitioner in the common carriage of freight on said rivers moves via routes and on joint rates prescribed by the said Commission under the orders above referred to. That each and all of said orders of the said Commission were made and were based upon the authority contained in section 3 (e) of the act of Congress first above referred to as amended by the act of Congress next above referred to.

IV

That if this honorable court shall sustain either of the contentions of plaintiff in this case, namely, the contention made by plaintiffs in their paragraphs VIII, IX, or X, the effect will be to render questionable the validity of all the aforesaid orders of the said
86 Commission respecting the business of this intervenor if, indeed, such holding does not render all of said orders of the Commission invalid.

V

That the operating revenues of this petitioner are, in a very large part, derived from the business of common carriage of freight conducted by this petitioner under the aforesaid orders of the Interstate Commerce Commission, and if said orders and their validity are disturbed by the conclusions reached by your honorable court in this case, the revenues upon which this petitioner relies for its financial existence will be seriously depleted.

VI

That this petitioner is informed and believes, hence so alleges, that in the event the aforesaid contentions of plaintiffs are sustained they will withdraw from participation with this petitioner and this barge line in said through routes and joint rates so ordered by said Commission and now in effect and will refuse to negotiate with this petitioner looking to the establishment of additional joint routes and rates in connection with the barge line of this petitioner under the said orders of said Commission.

VII

That this petitioner has been assured by the attorneys for the aforesaid plaintiffs that plaintiffs neither oppose nor consent
87 to intervention in this cause by the Inland Waterways Corporation and that plaintiffs waive notice of filing of this Motion.

VIII

That this petition is based upon the District Court Jurisdiction Act.

Wherefore this petitioner prays:

That your honorable court enter its order permitting this petitioner to intervene in said cause as a party-defendant for the purpose of taking such action as may be expedient for it to take in order to protect its rights therein, and that its answer in intervention which accompanies this petition be ordered filed in the papers of said cause and that all proper and requisite process, except insofar as it has been or may be waived by the other parties to this cause, do issue on account of this petition and have such further relief as this petitioner may be entitled to.

(Sgd.) CLARK C. WREN,
Solicitor for Intervenor: Inland Waterways Corporation,
1016 Munitions Building, Washington, D.C.

88 [*Duly sworn to by T. Q. Ashburn, jurat omitted in printing.*]

90 In United States District Court

[Title omitted.]

Order permitting intervention of inland waterways corporation as party defendant

Filed Feb. 27, 1933

This cause coming on to be heard upon motion made by counsel for the petitioner, Inland Waterways Corporation, in the above-entitled cause, it is by the court the 27 day of February, 1933,

Ordered that the Inland Waterways Corporation be, and it is hereby, permitted to intervene in the above-entitled cause as a party defendant; that it be, and is hereby, permitted to take and adopt the answer of the defendant, the Interstate Commerce Commission, as its answer to the bill of complaint, making in its own behalf the same admissions and allegations as are made in the said answer of the said defendant, the Interstate Commerce Commission.

(Sgd.) J. W. THOMPSON,
Circuit Judge.
(Sgd.) O. B. DICKINSON,
District Judge.
(Sgd.) JOHN P. NIELDS,
District Judge.

We accept notice of motion of the intervenor and interpose no objection to granting of this order.

(Sgd.) H. H. LARIMORE.
(Sgd.) E. A. SMITH,
(Sgd.) R. S. OUTLAW,
Attorney for the Plaintiffs.
(Sgd.) ELMER B. COLLINS,
Attorney for Defendant, United States of America.
(Sgd.) H. L. UNDERWOOD,
Attorney for Defendant, Interstate Commerce Commission.

91 [File endorsement omitted.]

92 In United States District Court

[Title omitted.]

Answer of intervenor Inland Waterways Corporation

Filed Feb. 27, 1933

Comes now the above-mentioned intervenor and, with leave of court first had and obtained, files this its answer as an intervening

defendant in the above-entitled and numbered cause. For answer this intervenor says:

I

That it is a corporation organized as such under an act of Congress with its principal place of business at 1016 Munitions Building, Washington, D.C., where service on it may be had.

II

For its answer herein this intervenor adopts the answer of the Interstate Commerce Commission, one of the defendants in said cause, or so much thereof as may be pertinent to be taken as the answer of this intervenor, and this intervenor makes, in its own behalf, each and all of the admissions and allegations made by the said Interstate Commerce Commission in its answer herein.

93 Wherefore this intervenor prays that all proper and requisite process, with the exception of that which has been or may be waived by the other parties to this proceeding, do issue on account of this answer and that upon hearing of this cause the plaintiffs be denied the relief prayed for by them and that this intervenor have judgment against said plaintiffs for its costs in this behalf incurred and for such further relief as intervenor may show itself entitled to.

(Sgd.) CLARK C. WREN,
Solicitor for Intervenor, Inland Waterways Corporation,
1016 Munitions Building, Washington, D.C.

[*Duly sworn to by T. Q. Ashburn, jurat omitted in printing.*]

94 [File endorsement omitted.]

95 In United States District Court

[Title omitted.]

Petition for leave to intervene as a party defendant

Filed Feb. 27, 1933

To the honorable the Justices of the District Court of the United States for the District of Delaware, holding a court of equity:

The petitioner, the American Barge Line Company, respectfully shows unto the court the following facts:

1. That the petitioner is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business at Louisville, State of Kentucky.

2. That the petitioner operates a barge line, and is engaged as a common carrier by water on the Ohio and Mississippi Rivers be-

tween Pittsburgh in the State of Pennsylvania, and New Orleans in the State of Louisiana, and receives and delivers freight at intermediate points between those two cities.

3. That the petitioner is the company mentioned and re-
96 ferred to in the bill of complaint in paragraphs I, sec. 4; II; III, sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10; V, 1, 2. IX, thereof.

4. That if the relief requested by the plaintiffs is granted, it will seriously and irreparably impair and, in fact, may completely destroy certain of the investments of the petitioner.

5. That by reason of the facts herein stated, and by reason of the facts alleged in the bill of complaint, any action taken by the court on the bill of complaint would materially affect the interest of your petitioner.

6. That this petition is based upon the District Court Jurisdiction Act (Judicial Code, title 28, section 45-a).

Wherefore, the premises considered, your petitioner prays:

1. That it be allowed to intervene in this proceeding as a party defendant for the purpose of taking such action as may be expedient for it to take in order to protect its rights therein.

2. That the answer filed by the defendant, the Interstate Commerce Commission, to the bill of complaint, or so much thereof as may be necessary and pertinent be taken and adopted as the answer of your petitioner.

AMERICAN BARGE LINE COMPANY,
By (Signed) ANDREW P. CALHOUN,
Vice President.

ESCH, KERR, WOOLLEY, TAYLOR & SHIPE.
By (Signed) JOHN J. ESCH,
Attorney for Intervenor.

[*Duly sworn to by Andrew P. Calhoun, jurat omitted in printing.*]

97 [File endorsement omitted.]

98 In United States District Court

[Title omitted.]

Order permitting intervention of American Barge Line Company as party defendant

Filed Feb. 27, 1933

This cause coming on to be heard upon motion made by counsel for the petitioner, American Barge Line Company, in the above-entitled cause, it is by the court the 27th day of February, 1933,

Ordered, that the American Barge Line Company be, and it hereby is, permitted to intervene in the above-entitled cause as a party defendant; that it be, and hereby is, permitted to take and

adopt the answer of the defendant, the Interstate Commerce Commission, as its answer to the bill of complaint.

(Sgd.) J. W. THOMPSON,
Circuit Judge.
(Sgd.) O. B. DICKINSON,
District Judge.
(Sgd.) JOHN P. NIELDS,
District Judge.

99 We accept notice of motion of the intervenor and interpose no objection to granting of this order.

(Sgd.) ELMER B. COLLINS,
Attorney for United States.
(Sgd.) H. L. UNDERWOOD,
Attorney for Interstate Commerce Commission.

[File endorsement omitted.]

100 In United States District Court

[Title omitted.]

Petition for leave to intervene as a party defendant

Filed Feb. 27, 1933

To the honorable the Justices of the District Court of the United States for the District of Delaware, holding a court of equity:

The petitioner, Mississippi Valley Barge Line Company, respectfully shows unto the court the following facts:—

1. That the petitioner is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business at St. Louis, State of Missouri.

2. That the petitioner operates a barge line, and is engaged as a common carrier by water on the Mississippi River between New Orleans, in the State of Louisiana, and St. Louis, in the State of Missouri, and between the city of New Orleans, in the State of Louisiana, and the city of Cincinnati, in the State of Ohio, and receives and delivers freight at intermediate points between those cities.

101 3. That the petitioner is vitally interested in freight rates, both rail and water, applicable to the territory served by it; that the petitioner is interested in having retained the proper differentials in rates for freight transported in commerce by rail and water in the territory served by it.

4. That if the relief requested by the plaintiffs is granted, it will seriously and irreparably impair, and, in fact, it may completely destroy the investment of the petitioner.

5. That once the transportation on the Mississippi and Ohio Rivers ceased, the petitioner believes and alleges that the rail rates would be increased to a dry-land basis.

6. That by reason of the facts herein stated, and by reason of the facts alleged in the bill of complaint, any action taken by the court on the bill of complaint would materially affect the interest of your petitioner.

7. That the petitioner is a certified common carrier, subject to regulation by the Interstate Commerce Commission.

8. That this petition is based upon the District Court Jurisdiction Act (Judicial Code, title 28, section 45-a).

Whereas the premises considered, your petitioner prays:

1. That it be allowed to intervene in this proceeding as a party defendant for the purpose of taking such action as may be expedient for it to take in order to protect its rights therein.

2. That the answer filed by the defendant, the Interstate Commerce Commission, to the bill of complaint, or so much thereof as may be necessary and pertinent be taken and adopted as the answer of your petitioner.

MISSISSIPPI VALLEY BARGE LINE COMPANY,
By (Sgd.) L. W. CHILDRESS, *President, Mississippi Valley Barge Line Company, St. Louis, Missouri.*

102 ESCH, KERR, WOOLLEY, TAYLOR & SHIPE,
By JOHN J. ESCH,
Attorney for Intervener,
736 Transportation Building, Washington, D.C.

[*Duly sworn to by L. W. Childress, jurat omitted in printing.*]
[File endorsement omitted.]

103 In United States District Court

[Title omitted.]

Order permitting intervention of Mississippi Valley Barge Line as party defendant

Filed Feb. 27, 1933

This cause coming on to be heard upon motion made by counsel for the petitioner, Mississippi Valley Barge Line, in the above-entitled cause, it is by the court this 27th day of February 1933,

Ordered that the Mississippi Valley Barge Line be, and it hereby is, permitted to intervene in the above-entitled cause as a party defendant; that it be, and hereby is, permitted to take and adopt the answer of the defendant, the Interstate Commerce Commission, as its answer to the bill of complaint.

(Sgd.) J. W. THOMPSON,
Circuit Judge.
(Sgd.) O. B. DICKINSON,
District Judge.
(Sgd.) JOHN P. NIELDS,
District Judge.

We accept notice of motion of the intervener and interpose no objection to granting of this order.

(Sgd.) ELMER B. COLLINS,
Attorney for United States.
(Sgd.) H. L. UNDERWOOD,
Attorney for Interstate Commerce Commission.

[File endorsement omitted.]

104 In United States District Court

[Title omitted.]

Petition for leave to intervene as a party defendant

Filed Feb. 27, 1933

To the honorable the Justices of the District Court of the United States for the District of Delaware, holding a court of equity:

The petitioner, the Mississippi Valley Association, respectfully shows unto the court the following facts:

1. That the petitioner is an association, duly incorporated and existing under and by virtue of the laws of the State of Louisiana, with its principal place of business at St. Louis, State of Missouri.

2. That the petitioner is interested in freight rates which will develop industry and promote commerce in the Mississippi Valley States; that the petitioner is interested in having retained a proper differential in rates for freight transported in commerce in the Mississippi Valley States by rail and water.

105 3. That petitioner believes and avers that should the relief prayed for by plaintiff be granted, continued operation of barge lines on the Mississippi and Ohio Rivers, would be seriously jeopardized, if not entirely discontinued.

4. That once the transportation on the Mississippi and Ohio Rivers ceased, the rail rates would be increased to a dry-land basis.

5. That by reason of the facts herein stated and by reason of the allegations in the bill of complaint, any action taken by the court on the bill of complaint would materially affect the interest of shippers in the Mississippi Valley States, and would materially affect the developing and promoting of industries in those States, all of which are of material interest to your petitioner.

6. That this petition is based upon the District Court Jurisdiction Act (Judicial Code, title 28, section 45-a).

Wherefore, the premises considered, your petitioner prays:

1. That is be allowed to intervene in this proceeding as a party defendant for the purpose of taking such action as may be expedient for it to take in order to protect its rights therein.

2. That the answer filed by the defendant, the Interstate Commerce Commission, to the Bill of Complaint, or so much thereof

as may be necessary and pertinent, be taken and adopted as the answer of your petitioner.

MISSISSIPPI VALLEY ASSOCIATION,
By (Sgd.) LACHLAN MACLEAY,
Executive Vice-President, Chamber of Commerce Building, 511 Locust Street, St. Louis, Missouri.
ESCH, KERR, WOOLLEY, TAYLOR & SHIPE,
By (Sgd.) JOHN J. ESCH,
Attorney for Intervener, 736 Transportation Building, Washington, D.C.

106 [*Duly sworn to by Lachlan Macleay, jurat omitted in printing.*]

[File endorsement omitted.]

107 In United States District Court

[Title omitted.]

Order permitting intervention of Mississippi Valley Association as party defendant

Filed Feb. 27, 1933

This cause coming on to be heard upon motion made by counsel for the petitioner, Mississippi Valley Association, in the above-entitled cause, it is by the court this 27th day of February 1933,

Ordered that the Mississippi Valley Association be, and it hereby is, permitted to intervene in the above-entitled cause as a party defendant; that it be, and hereby is, permitted to take and adopt the answer of the defendant, the Interstate Commerce Commission, as its answer to the bill of complaint.

(Sgd.) J. W. THOMPSON,
Circuit Judge.
(Sgd.) O. B. DICKINSON,
District Judge.
(Sgd.) JOHN P. NIELDS,
District Judge.

We accept notice of motion of the intervener and interpose no objection to granting of this order.

(Sgd.) ELMER B. COLLINS,
Attorney for United States.
(Sgd.) H. L. UNDERWOOD,
Attorney for Interstate Commerce Commission.

108 [File endorsement omitted.]

109 [File endorsement omitted.]

110 In United States District Court

[Title omitted.]

Affidavit of J. R. Staley

Filed February 23, 1933

J. R. Staley, being duly sworn, upon his oath states that he is general freight agent for the Missouri Pacific Railroad Company, one of the plaintiffs in the above-entitled cause. That he has been connected with the said Missouri Pacific Railroad Company for substantially five and one half years last past, all of which period has been spent by him in the traffic department of such railroad company.

111 Affiant also states that he has had approximately ten years experience in traffic matters, with special regard to rates in force via the lines of common carriers by railroad in the United States; has, during such period last named, been in continuous and daily contact with traffic matters and rates via such lines of railroad and has had particular experience in connection with rates on cotton via railroad between points in the Southwest and between points in the Southeast, on the one hand, and points in the United States generally, on the other.

Affiant makes this affidavit on behalf of Missouri Pacific Railroad Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers), St. Louis Southwestern Railway Company, and The Kansas City Southern Railway Company, plaintiffs in the above-entitled cause, and states that he is authorized to make such affidavit on the part of all of said common carriers by railroad just before named.

Affiant also states that by reason of his experience as heretofore set out he has personal knowledge of the location of the lines of railroad operated by the carriers above named, the communities and localities served by such lines of railroad, and has particular knowledge of the rates in effect via such lines of railroad, in so far as the transportation of cotton is concerned.

That lines of railroad operated by The Kansas City Southern Railway Company, The Chicago, Rock Island and Pacific Railroad Company, St. Louis-San Francisco Railway Company (J. M.

112 Kurn and John G. Lonsdale, receivers), St. Louis Southwestern Railway Company and Missouri Pacific Railroad Company serve generally points in the State of Arkansas, and that through their lines of railroad The Chicago, Rock Island and Pacific Railway Company, St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers), St. Louis Southwestern Railway Company and Missouri Pacific Railroad Company serve

the City of Memphis, Tennessee. That Missouri Pacific Railroad Company, St. Louis Southwestern Railway Company and St. Louis-San Francisco Railway Company have lines of railroad, and at all times herein mentioned did have such lines of railroad, extending from Memphis, Tennessee, to St. Louis, Missouri, at which points such lines of railroad connect with other lines of railroad extending eastwardly from said St. Louis.

Affiant states that on and prior to August 29, 1932, and at all times since such last-named date, Missouri Pacific Railroad Company, The Chicago, Rock Island and Pacific Railway Company, St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers), St. Louis Southwestern Railway Company, and The Kansas City Southern Railway Company participated, and now participate, in joint all-rail rates on cotton, any quantity, from points in the State of Arkansas to points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, on the basis generally prescribed by the Interstate Commerce Commission in a certain proceeding before that body known as Rate Structure Investigation, I.C.C. Docket No.
113 17,000, part 3, Cotton, and reported at 165 I.C.C. 595, and supplemental reports, and that all of such carriers last above named, except The Chicago, Rock Island and Pacific Railway Company and The Kansas City Southern Railway Company, during the period named and now participated, and participate, in joint rates on cotton, in any quantity, from Memphis, Tennessee, to points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, established generally on the basis prescribed by the Commission in said Docket No. 17,000, part 3. That said any quantity rates last before described on cotton were, and are, normal rates and were maintained and are now maintained by the carriers as reasonable maximum rates.

Affiant states that on August 29, 1932, the before-mentioned carriers and other carriers by railroad established carload rates on cotton from points in Arkansas and from Memphis, Tennessee, to the destination States before described because of severe competition from unregulated trucks and carriers by water upon a basis materially lower than the any-quantity rates on cotton theretofore and then prevailing and hereinbefore particularly described, and on November 16, 1932, further reduced said carload rates on cotton in the belief that such further reduced rates were necessary to meet the competition above referred to, and that such carload rates so established are not reasonable maximum rates, but, on the contrary, are depressed rates, necessary to meet existing unregulated movement by truck or water, or both.

Affiant states that there is now a movement of cotton in carloads
114 via all-rail routes from points in Arkansas and Memphis, Tennessee, to points in the destination territory heretofore referred to under the carload rates established as heretofore

[illegible] which the carriers by railroad earn and divide all-rail revenue.

That by a report and order, dated December 10, 1932, the Interstate Commerce Commission, upon applications of the American Barge Line Company in Docket Ex Parte No. 102, on a date specified in such order, required all of the carriers by railroad hereinbefore named and for which affiant is authorized to speak to participate in rail-barge-rail rates on cotton, in carloads, from points in Arkansas to points in the destination territory heretofore described lower than existing carload rates on cotton then in effect and heretofore specifically described. That the rail-barge-rail rates from points in Arkansas required to be established by the said Commission were based on the following differentials under the corresponding all-rail rates:

8 cents, minimum 25,000–40,000 pounds;
6 cents, minimum 35,000–55,000 pounds;
4 cents, minimum 50,000–80,000 pounds.

By the same report and order the Commission required to be established a barge-rail rate on cotton, in carloads, minimum 37,000 pounds, from Memphis, Tennessee, to the destination territory heretofore described for application over barge-rail routes based on the differential of 6 cents under the all-rail rate on cotton, in carloads, from Memphis, Tennessee, to such destination territory then in effect.

Affiant states that in its orders as aforesaid requiring the
115 establishment and maintenance of the rail-barge-rail rates as aforesaid to be participated in as aforesaid by the carriers by railroad heretofore mentioned, the Commission did not require that the difference in rates, rail-barge-rail and under all-rail rates, should be borne by the barge line, and the result will be that if such rail-barge-rail rates on cotton, in carloads, are established as required by the Commission, carriers by railroad participating therein will receive lower revenue and less money for the transportation of cotton, in carloads, via rail-barge-rail routes than they would receive if such cotton moved via all-rail routes.

Affiant further states as regards the movement of cotton from Memphis, Tennessee, to the destination territory here involved, that if and when cotton moves from Memphis, Tennessee, to points in the destination territory here affected under the barge-rail rates required to be established as aforesaid, the Missouri Pacific Railroad Company, St. Louis Southwestern Railway Company and the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers) will be denied the use of their lines extending from Memphis, Tennessee, to St. Louis, Missouri, in connection with the movement of such cotton, and will, therefore, be deprived of transporting such cotton, which would otherwise move via all-rail routes and over the lines of the carriers by railroad just named from Memphis, Tennessee, to St. Louis, Missouri, and affiant states that there is at present a substantial movement of cotton, in carloads, from Memphis,

Tennessee, to points in the destination territory heretofore described via the lines of the Missouri Pacific Railroad Company, St.
116 Louis Southwestern Railway Company and St. Louis-San Francisco Railway Company from Memphis, Tennessee, through St. Louis, Missouri, which said movement will be materially reduced if the barge-rail rate ordered by the said Commission becomes effective by reason of the fact that the barge-rail rate ordered to be established from Memphis, Tennessee, to the destination territory here involved is substantially lower than the all-rail rate, carloads, on cotton from Memphis, Tennesee, to such destination territory.

As to rail-barge-rail rates on cotton, in carloads, required to be established as aforesaid by the Commisison, cotton moving by such routes will move by rail from points in Arkansas to Memphis, Tennessee, by barge to Pittsburgh, Pennsylvania, and thence by rail to the destination territory heretofore described, and from many points of origin on their lines in Arkansas the Missouri Pacific Company, St. Louis Southwestern Railway Company, and St. Louis-San Francisco Railway Company will be deprived of the full use of their lines of railroad in connection with the transportation of such cotton by reason of the fact that all of such cotton that moves rail-barge-rail will move to Memphis, Tennessee, a shorter distance than through St. Louis, Missouri, and in consequence of being short-hauled (as just described, such carriers by railroad will be deprived of substantial revenue, and affiant states that there is a substantial movement of cotton, in carloads, via all-rail routes in which the Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers), and St. Louis Southwestern Railway Company now participate from points on
117 their lines in Arkansas to the destination territory heretofore mentioned.

Further, affiant states that the Kansas City Southern Railway Company, which now participates in the transportation of cotton, in carloads, via all-rail routes between points in Arkansas and the destination territory heretofore described, will sustain losses in revenue, because it will, if the rail-barge-rail rates described as aforesaid become effective, be required to surrender cotton at junction points in Arkansas for transportation to Memphis that will result in the Kansas City Southern Railway Company earning less revenue than it would earn if such cotton moved all-rail routes from points in Arkansas to the destination territory involved, and that the situation of the Chicago, Rock Island and Pacific Railway Company is substantially similar to the situation of the Kansas City Southern Railway Company and just described.

Further affiant states that the St. Louis Southwestern Railway Company, Missouri Pacific Railroad Company, the Chicago, Rock Island and Pacific Railway Company, St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers), and

the Kansas City Southern Railway Company are common carriers by railroad and subject to the Interstate Commerce Act. That the orders made by the Commission in said Docket Ex Parte No. 102 on the applications of American Barge Line Company were made and entered by the Commission without affording carriers by railroad required to participate in the rail-barge-rail and barge-rail rates required to be established, a hearing, and such rail-barge-rail
118 and barge-rail rates as before described were ordered to be established by the Commission without testimony and require lower rates via rail-barge-rail routes and barge-rail routes on cotton, in carloads, than in effect via all-rail routes from points in Arkansas and from Memphis, Tennessee, to the destination territory heretofore described, which will divert a large amount of cotton from all-rail to rail-barge-rail and barge-rail routes. That the cotton, in carloads, that will move under such rail-barge-rail and barge-rail rates originates at points in the State of Arkansas on the lines of Missouri Pacific Railroad Company, St. Louis Southwestern Railway Company, the Chicago, Rock Island and Pacific Railway Company, St. Louis-San Francisco Railway Company, the Kansas City Southern Railway Company, and other lines of railroad whose rails are located in the State of Arkansas.

Affiant also states that the carriers by railroad specifically named in the next above and foregoing paragraph during the year 1932 did not earn and now are not earning revenue sufficient to meet their interest requirements; that is, are not earning enough revenue to pay their fixed charges, and if the rail-barge-rail rates and barge-rail rates hereinbefore described are made effective, such carriers by railroad will be deprived of additional revenue much needed by such carriers; and also, that the rail-barge-rail and barge-rail rates required to be established as aforesaid are unreasonably low, are lower than the carload all-rail rates now in effect, which said rates last named are much depressed, and the carriers by railroad required by the orders of the Commission aforesaid to participate in said
119 rail-barge-rail rates will be forced to participate, if such orders are made effective, in rates unreasonably low and be deprived of earnings that would otherwise accrue to such carriers, if they were not required to participate in such rail-barge-rail rates.

(Signed) J. R. STALEY.

[*Duly sworn to by J. R. Staley, jurat omitted in printing.*]

120 In United States District Court

Affidavit of O. M. Meyne

Filed Feb. 23, 1933

STATE OF OHIO,

County of Cuyahoga, ss:

O. M. Meyne, being first duly sworn, deposes and says that he is general freight agent of Erie Railroad Company with headquarters at Cleveland, Ohio;

That he has made an investigation of the accounting and traffic department records of Erie Railroad Company for the purpose of determining (1) the volume of movement of baled cotton, carloads, from origin points in Arkansas and from Memphis, Tenn., handled via the lines of Erie Railroad subsequent to September 1, 1932, and the gross revenue derived therefrom, and (2) what effect the decision of the Interstate Commerce Commission dated December 10, 1932, in ex parte 102, Application of American Barge Line Company, 190 I.C.C. 7, if permitted to become effective, would have upon such traffic and revenue of Erie Railroad Company;

That during the months of September, October, November, and December 1932 and January 1933 Erie Railroad Company received from its connections, principally at Buffalo, N.Y., a total of 49 cars of baled cotton originating at points in Arkansas and/or Memphis, Tenn., and transported said cars over its line to Binghamton, N.Y., and there delivered said cars to its connection for movement beyond to various points in the New England States;

That for the aforesaid transportation services Erie Railroad Company received on the average approximately $27.00 gross revenue per car, and that on the basis of a full year's business, calculated at the rate of 9.9 cars per month, 119 cars at $27.00 each would result in gross Erie revenue of $3,213.00;

That if rates are established on cotton via the American Barge Line at a differential under the present all-rail rates the cotton traffic from Arkansas origins and Memphis, Tenn., would undoubtedly be diverted from the all-rail routes and would move via the American Barge Line to Pittsburgh, Pa., and Erie Railroad Company would not, under ordinary circumstances, participate in the transportation movement, especially on traffic destined to New England points, and it would be deprived of above-mentioned revenue it now enjoys on this traffic.

121

(Signed) O. M. MEYNE.

Subscribed and sworn to before me this 20th day of February, 1933.

[SEAL]

(Signed) VANSTAN LEE,
Notary Public.

[File endorsement omitted.]

122

In United States District Court

[Title omitted.]

Affidavit of J. P. Patterson

Filed Feb. 23, 1933

STATE OF ILLINOIS,
County of Cook, ss:

Affiant, J. P. Patterson, being first duly sworn, states on oath that he is assistant freight traffic manager of the New York Central Rail-

[illegible] company, and has been a traffic officer of such company for ten years last past; that he is familiar with the location of the lines of railroad of The New York Central Railroad Company and its leased lines over which cotton moves from Memphis, Tennessee, to destinations in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

Affiant further states that The New York Central Railroad Company and its leased lines operate lines of railroad extending from Cairo and St. Louis, Illinois, Evansville, Indiana, Louisville, Kentucky, and Cincinnati, Ohio, to certain eastern destinations; that the lines of The New York Central Railroad Company and its leased lines connect at the above-mentioned points with the lines of other carriers, plaintiffs in this proceeding; that joint through rates on cotton are now in effect from Memphis, Tennessee, applying by the lines of plaintiffs to Indianapolis, Indiana, and thence by eastern all-rail connections to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut; that cotton has been and is moving today from Memphis, Tennessee,
123 by this all-rail route through Indianapolis, Indiana, to these destinations on the said joint-through rates that apply over the said route.

Affiant further states that in his capacity as said assistant freight traffic manager he has charge of the establishment, maintenance, and revision of the freight rates on cotton applying from Cairo and St. Louis, Illinois, Indianapolis, Indiana, Louisville, Kentucky, and Cincinnati, Ohio, to destinations in the said States of Pennsylvania, New Jersey, Massachusetts, Rhode Island, and Connecticut; that he is familiar with those rates and with the quantity of cotton that has moved under those rates during the last few years and is moving today under those rates; that he is also familiar with the effect upon the quantity of cotton that moves by the all-rail routes hereinbefore described from Memphis, Tennessee, and from points in Arkansas to destinations in the said States, of rates applying by barge-rail and rail-barge-rail routes that are less than the rates applying by the all-rail routes hereinbefore described; that it has been his experience that the establishment of rates by barge-rail and rail-barge-rail routes from cotton-shipping points of origin in the States of Mississippi, Tennessee, and Arkansas, that are less than the rates applying by the all-rail routes from the said points of origin, has inevitably resulted in the diversion of a very substantial quantity of cotton traffic from the all-rail routes to the barge-rail and rail-barge-rail routes over which cheaper rates apply.

Affiant further states that cotton shipped to destinations in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, from either Memphis, Tennessee, or from points in Arkansas by the barge-rail and rail-barge-rail routes respectively prescribed by the Interstate Commerce Commission in its said

order of December 10, 1932, in Ex Parte No. 102, Application of American Barge Line Company, would move from Memphis, Tennessee, by the water route of the American Barge Line Company extending on the Mississippi and Ohio Rivers from Memphis, Tennessee, to Pittsburgh, Pennsylvania, and that when cotton moves by such barge-rail and rail-barge-rail routes, affiant states that a certain proportion or all of the cotton which moves via the New York Central Railroad Company and its leased lines should be received by it at Pittsburgh, Pennsylvania, or Buffalo, New York, thus short hauling The New York Central Railroad Company and its leased lines to a very considerable extent.

Affiant further states that if the barge-rail and rail-barge-rail rates take effect in accordance with the said order of the Interstate Commerce Commission of December 10, 1932, in Ex Parte No. 102, Application of American Barge Line Company, such cotton as moves under the said rates will be irretrievably lost to the all-rail routes, and that even though the Interstate Commerce Commission should in a later proceeding find that the differentials that it has prescribed in its said order of December 10, 1932, were too great and should be reduced, the New York Central Railroad Company and its leased lines would have no means of recovering back any portion of the revenue that it would have received from cotton that would have moved by its all-rail routes had the differentials been fixed by the Interstate Commerce Commission at amounts that are less than the differentials fixed by the Interstate Commerce Commission in its said order of December 10, 1932.

Affiant further states that to his own knowledge, other important carriers by railroad, parties to this bill of complaint, participate in joint through all-rail rates on cotton from the origin territory to the destination territory hereinbefore described, and under such

125 rates do now handle a part of the cotton traffic moving from and to said territories, and that if the rail-barge-rail and barge-rail rates on cotton heretofore referred to become effective, a substantial part of the cotton traffic now handled by plaintiffs herein will be diverted from all-rail routes in which plaintiffs participate to rail and water routes in which said plaintiffs cannot participate although your affiant is unable to approximate with any accuracy the exact amount of such diversion.

(Signed) J. P. PATTERSON.

Subscribed and sworn to before me in the County of Cook, State of Illinois, this 21st day of February, A.D. 1933.

[SEAL] (Signed) LEO P. DAY,
Notary Public.

[File endorsement omitted.]

[Title omitted.]

Affidavit of S. C. Matthews

Filed Feb. 23, 1933

STATE OF ILLINOIS,
County of Cook, ss:

Affiant, S. C. Matthews, being first duly sworn, states on oath that he is assistant freight traffic manager of the Pennsylvania Railroad Company and has been connected with the traffic department of the Pennsylvania Railroad Company and its affiliated lines for over twenty-five years last past; that he is familiar with the location of the lines of railroad of the Pennsylvania Railroad Company and the route of the Pennsylvania Railroad Company over which cotton moves when delivered by the Illinois Central at Indianapolis, Indiana, to the Pennsylvania Railroad, destined to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

Affiant further states that the Pennsylvania Railroad Company operates a line of railroad extending from Indianapolis to New York City and other eastern points; that the line of the Pennsylvania Railroad connects at junctions in the vicinity of New York City with the lines of other carriers, plaintiffs in this proceeding; and that joint through rates on cotton of 69 cents per 100 pounds are now in effect from Memphis, Tennessee, applying via the line of the Illinois Central Railroad Company to Indianapolis, Indiana, and thence by the Pennsylvania Railroad Company to points in Pennsylvania, New York, and New Jersey, and its connecting eastern carriers to Massachusetts, Rhode Island and Connecticut;

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that cotton has been and is moving today from Memphis, Tennessee, by this all-rail route from Indianapolis, Indiana, to these destinations on the said joint through rates that apply over the said route.

Affiant further states that there is also delivered to the Pennsylvania at Indianapolis, Indiana, cotton that moves from points in Arkansas to Memphis, Tennessee, and delivered to the Pennsylvania Railroad Company at Indianapolis, Indiana, by the Illinois Central Railroad Company and moving to destinations in the States of Pennsylvania, New York, New Jersey, Rhode Island, Massachusetts, and Connecticut.

Affiant further states that in the division of the all-rail rate from Memphis, Tennessee, to Boston, Massachusetts, Boston, being selected as a representative destination, the rail lines east of Indianapolis receive a proportion of 40.9 cents per cwt.; that under the second supplemental report of the Commission in Ex Parte 102, dated December 10, 1932, the barge-rail rate from Memphis to points in

Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut becomes a specific differential of 6 cents under the all-rail rates, instead of the differential figured on basis of 20 per-cent of the port-to-port rate deducted from the all-rail rate, which makes the barge-rail rate via Pittsburgh 63 cents per 100 pounds; that there is no fixed basis prescribed for dividing the new barge-rail rates to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut; but if the basis known as the "Commission's Ex Parte 99 formula" is applied to the new rates, the rail portion east of Pittsburgh will become 32.8 cents per 100 pounds, and the difference between the rail proportion east of Pittsburgh out of the proposed barge-rail rate and the rail proportion east of Indianapolis out of the all-rail rate will be 8.1 cents per cwt.

Affiant further states that if the barge-rail and rail rates take effect in accordance with the said order of the Interstate Commerce Commission of December 10, 1932, in Ex Parte 102, such cotton as moves under the said rates will be irretrievably lost to the all-rail routes;

128 and even though the Interstate Commerce Commission should in a later proceeding find that the differentials that it had prescribed in said order of December 10, 1932, were too great and should be reduced, the Pennsylvania Railroad Company would have no means of recovering back any portion of the revenue that it should have received from cotton moving from Memphis, Tennessee, or points in Arkansas, that would have moved by the all-rail route.

Further affiant sayeth not.

(Signed) S. C. MATTHEWS.

Subscribed and sworn to before me this 21st day of February, A.D. 1933.

[SEAL] (Signed) MICHAEL J. HABERKORN,
Notary Public.

[File endorsement omitted.]

129 In United States District Court

[Title omitted.]

Affidavit of Robert D. Reeves

Filed Feb. 23, 1933

STATE OF TENNESSEE,
County of Shelby, ss:

Affiant, Robert D. Reeves, being first duly sworn, states on oath that he is assistant traffic manager of the Illinois Central Railroad Company, and has been engaged in rate and traffic work and an officer of different companies and of such company for over 30 years last past; that he is familiar with the location of the lines of railroad of the Illinois Central Railroad Company and the routes of the Illinois Central Railroad Company over which cotton moves from

Memphis, Tennessee, to destinations in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

Affiant further states that the Illinois Central Railroad Company operates a line of railroad extending from Memphis, Tennessee, through Cairo, Illinois, to Indianapolis, Indiana; that the line of the Illinois Central Railroad Company connects at Indianapolis, Indiana, with the lines of other carriers, plaintiffs in this proceeding; that joint through rates on cotton are now in effect from
130 Memphis, Tennessee, applying by the line of the Illinois Central Railroad Company to Indianapolis, Indiana, and thence by its eastern all-rail connections to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut; that cotton has been and is moving today from Memphis, Tennessee, by this all-rail route through Indianapolis, Indiana, to these destinations on the said joint through rates that apply over the said route.

Affiant further states that at Memphis, Tennessee, the railroad of the Illinois Central Railroad Company connects with the railroads of carriers whose rails extend from points in Arkansas to Memphis, Tennessee, such as the Missouri Pacific Railroad Company, the St. Louis Southwestern Railway Company, the Chicago, Rock Island and Pacific Railway Company, and the St. Louis-San Francisco Railway Company (J. M. Kurn and John G. Lonsdale, receivers); that there are through joint all-rail rates on cotton applying from points of origin in Arkansas on some of the lines of these carriers whose rails extend from these points of origin in Arkansas to Memphis, Tennessee, thence by the said route of the Illinois Central Railroad Company through Indianapolis, Indiana, to destinations in the said States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut; that cotton has been and is moving today from these points in Arkansas by way of Memphis, Tennessee, and thence by the route of the Illinois Central Railroad Company through Indianapolis, Indiana, to destinations in the said States on the joint through rates that apply over such routes.

Affiant further states that in his capacity as said assistant traffic manager, he has charge of the establishment, maintenance, and revision of the freight rates on cotton applying from Memphis, Tennessee, and from points of origin in Arkansas by the all-rail routes hereinbefore described, to destinations in the said States of
131 Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut; that he is familiar with those rates and with the quantity of cotton that has moved under those rates during the last few years and is moving today under those rates; that he is also familiar with the effect upon the quantity of cotton that moves by the all-rail routes hereinbefore described from Memphis, Tennessee, and from points in Arkansas to destinations in the said States, of rates applying by barge-rail and rail-barge-rail routes that are less than the rates applying by the all-rail routes hereinbefore described from Memphis, Tennessee, and points in Arkansas;

that it has been his experience that the establishment of rates by barge-rail and rail-barge-rail routes from cotton-shipping points of origin in the States of Mississippi, Tennessee, and Arkansas, that are less than the rates applying by the all-rail routes from the said points of origin, has inevitably resulted in the diversion of a very substantial quantity of cotton traffic from the all-rail routes to the barge-rail and rail-barge-rail routes over which cheaper rates apply.

Affiant further states that cotton shipped to destinations in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut from either Memphis, Tennessee, or from points in Arkansas by the barge-rail and rail-barge-rail routes respectively prescribed by the Interstate Commerce Commission in its said order of December 10, 1932, in Ex Parte No. 102, Application of American Barge Line Company, would move from Memphis, Tennessee, by the water route of the American Barge Line Company extending on the Mississippi and Ohio Rivers from Memphis, Tennessee, to Pittsburgh, Pennsylvania, and that when cotton moved by such barge-rail and rail-barge-rail routes, the Illinois Central Railroad Company
132 would not participate in any part of such movement.

Affiant further states that based upon his contact with the cotton trade, his experience in traffic matters in the cotton-producing territory in Arkansas, Tennessee, Mississippi, and Kentucky, his knowledge of the quantity of cotton produced in Arkansas and in the territory in Tennessee, Mississippi, and Kentucky that is tributary to Memphis, Tennessee, and that would move under the rates that are now in effect and apply over the all-rail routes hereinbefore described, which are made up of some portion of the lines of the Illinois Central Railroad Co., in his opinion the annual movement of cotton that would move by the all-rail routes hereinbefore described from Memphis, Tenn., and from points of origin in Arkansas to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut will amount to approximately 53,000 bales; that if the barge-rail and rail-barge-rail rates prescribed by the Interstate Commerce Commission in its said order of December 10, 1932, in Ex Parte No. 102, Application of American Barge Line Company, which are less than the corresponding all-rail rates applying over the all-rail routes hereinbefore described by the amounts prescribed by the Interstate Commerce Commisison in its said order, become effective, the Illinois Central Railroad Company will suffer a diversion to rail-water routes of approximately half its annual movement of cotton from the origin to the destination territory involved, with a resulting loss to it of approximately $40,000.00, based upon the established divisions of through all-rail rates now in effect between it and its connections by the all-rail routes hereinbefore described.

Affiant further states that if the barge-rail and rail-barge-
133 rail rates take effect in accordance with the said order of the Interstate Commerce Commisison of December 10, 1932, in

such cotton as moves under the said rates will be irretrievably lost to the all-rail routes, and that even though the Interstate Commerce Commisison should in a later proceeding find that the differentials that it has prescribed in its said order of December 10, 1932, were too great and should be reduced, the Illinois Central Railroad Company would have no means of recovering back any portion of the revenue that it would have received from cotton from Memphis, Tennessee, or points in Arkansas that would have moved by its all-rail routes had the differentials been fixed by the Interstate Commerce Commission at amounts that are less than the differentials fixed by the Interstate Commerce Commission in its said order of December 10, 1932.

Affiant further states that to his own knowledge other important carriers by railroad, such as the Louisville & Nashville Railroad Company and Southern Railway Company, participate in joint-through all-rail rates on cotton from the origin territory to the destination territory hereinbefore described, and under such rates do now handle a part of the cotton traffic moving from and to said territories, and that if the rail-barge-rail and barge-rail rates on cotton heretofore referred to become effective, a substantial part of the cotton traffic now handled by the Louisville & Nashville and Southern Railway Companies will be diverted from all-rail routes in which they participate to rail and water routes in which said companies cannot participate, although your affiant is unable to approximate with any accuracy the exact amount of such diversion.

(Signed) ROBERT D. REEVES.

Subscribed and sworn to before me in the county and State aforesaid, this 18th day of February, A.D. 1933.

[NOTARIAL SEAL.] (Signed) F. J. THEOBALD,
Notary Public.

134 [File endorsement omitted.]

135 In United States District Court

[Title omitted.]

Affidavit of George A. Casey

Filed Feb. 27, 1933

CITY OF WASHINGTON,
District of Columbia, ss:

George A. Casey, being first duly sworn, deposes and says that he is assistant to the director of the Bureau of Statistics of the Interstate Commerce Commission; that said Bureau has in charge the various reports of movements of commodities of common carriers

by railroad subject to the Interstate Commerce Act, made under regulations of the Interstate Commerce Commission issued pursuant to authority contained in said Interstate Commerce Act; that pursuant to his instructions and under his direction and supervision, there were compiled data with respect to the movement of cotton during the calendar years 1930, 1931, and the first three quarters of the year 1932, over the lines of the Illinois Central Railroad Company, the Southern Railway Company, the Louisville & Nashville Railroad Company, and the Yazoo and Mississippi Valley Railroad Company; that these figures and data were taken and compiled from reports made by each of said companies for the respective periods; that the following table sets forth the result of such compilation and shows the extent and amount of all cotton handled by said companies for the specific periods, to wit:

Cotton in bales

CARLOADS ORIGINATED

Period ended	Illinois Central R.R. Co.	Yazoo & Mississippi Valley R.R.	Southern Railway Company	Louisville & Nashville R.R. Co.
1930				
First quarter	3,694	4,256	4,369	1,191
Second quarter	2,235	1,441	3,610	605
Third quarter	1,747	2,656	2,155	733
Fourth quarter	6,484	10,428	6,058	3,762
1931				
First quarter	5,443	(1)	2,473	985
Second quarter	2,966	(1)	2,590	558
Third quarter	2,337	(1)	1,976	316
Fourth quarter	13,624	(1)	3,861	1,451
1932				
First quarter	6,842	(1)	2,090	620
Second quarter	2,775	(1)	892	298
Third quarter	4,994	(1)	1,814	427

TONS ORIGINATED

1930				
First quarter	42,535	44,450	45,868	12,599
Second quarter	29,768	16,285	40,818	7,147
Third quarter	20,010	23,623	19,382	5,894
Fourth quarter	64,588	97,416	53,598	32,213
1931				
First quarter	59,311	(1)	27,803	9,452
Second quarter	33,077	(1)	28,581	5,637
Third quarter	24,083	(1)	21,022	2,927
Fourth quarter	131,513	(1)	39,368	14,782
1932				
First quarter	70,998	(1)	23,402	8,623
Second quarter	32,577	(1)	12,007	4,277
Third quarter	56,631	(1)	20,383	4,951

[1] Current reports of Illinois Central R.R. include Yazoo & Mississippi Valley Railroad.

137 Deponent further says that the reports of the above-named carriers do not show to what extent or for what distance over their respective lines the movements of cotton took place, nor do

said reports show the origin or destination points of the said shipments; but deponent avers that the said figures and data herein set forth do show and cover the entire amount of cotton in bales carried over the lines of the said carriers irrespective of the length of the haul, whether handled as a shipment entirely local to the line of the respective railroad or as a part of a transportation movement in connection with other lines of railroad.

(Sgd.) GEORGE A. CASEY.

Subscribed and sworn to before the undersigned, a notary public, within and for the District of Columbia, this 25th day of February, 1933.

[SEAL.]

(Sgd.) WM. B. WILBUR,
Notary Public.

Commission expires 1/11/34.

[File endorsement omitted.]

138 In United States District Court

[Title omitted.]

Affidavit of T. Q. Ashburn

Filed Feb. 27, 1933

T. Q. Ashburn, being duly sworn upon his oath, states that he is a major general of the Regular Army of the United States and also occupies the position of chairman of the board and president of the Inland Waterways Corporation, an intervenor in the above-entitled and numbered cause. He has been connected with said corporation in substantially the capacity above mentioned for the past eight and one half years, during all of which period he has been familiar with the affairs of the Federal Barge Lines, the name given the operating unit owned by the Inland Waterways Corporation, which is engaged in the business of common carriage of freight in interstate commerce on the Mississippi River, on the Illinois River, and on the Warrior River channel.

Affiant states that during all of said period the said barge line has, at its various ports of call on said channels, interchanged freight moving via rail and water common carriers in joint through routes between points of origin and points of destination, and that

139 he is familiar with the controversies and difficulties incident to securing joint arrangements between water and rail carriers for such service which prevailed prior to the adoption on May 29, 1928, of the provision contained in section 3 (e) of the Inland Waterways Corporation Act as amended, and is familiar with all of the proceedings of the Interstate Commerce Commission under said section 3 (e) since its adoption.

Affiant states that prior to the adoption of said section 3 (e) it was impossible for any barge line engaged in common carriage of freight to secure from any but friendly railroads joint arrangement for the movement of freight in interstate commerce via rail and water without first indulging in a proceeding before the Interstate Commerce Commission under appropriate provisions of the Interstate Commerce Act prolonged by the efforts of hostile rail carriers. That since the adoption of said section 3 (e) the Inland Waterways Corporation secured from the Interstate Commerce Commission, in compliance with said section, a certificate of public necessity and convenience as an incident to which the said Commission prescribed certain rules and regulations to govern in the ascertainment of appropriate routes and rates on traffic seeking to move partly by rail and partly by water from origin to destination, all as shown in the attached copy of the order of the said Commission decided April 8, 1929, in a cause which the Commission has entitled "Ex Parte No. 96, Through Routes and Joint Rates Between Inland Waterways Corporation and Other Common Carriers", a copy of which is attached hereto and marked "Exhibit A" as a part of this affidavit, and that, later, the said Commission in the same docket by an order decided May 15, 1930, amended its said previous order as is shown in a copy of said later order attached hereto and marked "Exhibit B" as a part of this affidavit.

140 That immediately after the promulgation of the earlier order of the Commission above referred to, the Inland Waterways Corporation employed a large number of tariff experts and their necessary clerks and assistants, and the rail lines furnished a number of tariff clerks and assistants, and the two groups have been, since then, engaged in checking in joint routes and rates in compliance with the formulas laid down in said orders of said Commission. That this work has entailed great expense to both the Inland Waterways Corporation on the one hand and the interested rail carriers on the other. That as a result of this work a joint rail and water tariff system is gradually being constructed in accordance with the orders of said Commission and that for a long time past and at the present time a large amount of the freight handled by the barge line of the Inland Waterways Corporation moves via the routes and under the differentially constructed rates arrived at and published in accordance with the said orders of said Commission.

This affiant further states that transportation via barge line is necessarily and inherently slower and less desirable to shippers than is transportation by rail, and that in order to attract any business the barge line must be able to quote rates that are considerably lower than those quoted by the rail carriers.

Affiant further states that he is familiar with the costs of transportation of freight by barge and with the cost of transportation of freight by rail and that the cost of transportation of freight by barge is cheaper than is the cost of transportation of freight by rail except in particular instances which, because of difficulties or re-

quirements or general conditions surrounding particular movements of freight, do not present economy in movement by water.

141 That during affiant's connection with the Inland Waterways Corporation a large amount of cotton has moved via the barge line of said Corporation and affiant has become familiar by long experience with the characteristics of the movement of cotton as freight in the United States. That such movement is seasonal in the extreme and begins, ordinarily, in volume during the month of September in each year and gradually increases in volume until about the month of January, when the volume of movement gradually decreases until about the month of May, at which time the movement ceases except for infrequent shipments of small lots which continue intermittently throughout the balance of the year.

Affiant further states that if the rail lines are permitted to lower their rates on cotton and other important commodities suitable for transportation via barge upon the claim that this is necessary in order to protect the rails from competition by truck and water carrier and barge lines are, at the same time, denied the right to quote rates differentially lower than the rail rates all traffic will leave the barge lines and the latter will be thus forced to go out of business.

T. Q. ASHBURN.

[*Duly sworn to by jurat omitted in printing.*]

142 *Exhibit "A" to affidavit of T. Q. Ashburn.*

15693. Interstate Commerce Commission. Ex Parte No. 96. Through Routes and Joint Rates Between Inland Waterways Corporation and Other Common Carriers

143

EX PARTE NO. 96 [1]

Through Routes and Joint Rates Between Inland Waterways Corporation and Other Common Carriers

Decided May 15, 1930

1. Upon reconsideration, original findings modified to provide (a) that no barge-rail rate or rail-barge-rail rate established thereunder shall be lower than the all-rail rate between the inland point of origin or destination and the port of interchange with the barge line and (b) that barge-rail rates between Mobile, Ala., and points in southern territory shall be no higher than the corresponding barge-rail rates between New Orleans, La., and the same points. Former order amended. Prior reports, 153 I.C.C. 129, 156 I.C.C. 141, and 161 I.C.C. 207.
2. Proposed barge-rail rates between New Orleans, La., and Mobile, Ala., on the one hand, and points in southern territory on the

[1] This report also embraces Investigation and Suspension Docket No. 3337, Sugar and Class Rates Between Points in the South via Barge and Rail Routes.

other hand, found justified, except rates which result in departures from the long-and-short-haul provision at Mobile. Rates found not justified required to be canceled without prejudice to publication of new rates in accordance with findings herein. Proceeding discontinued.

Luther M. Walter, John S. Burchmore, Nuel D. Belnap, W. M. Hough, and H. L. Walker for respondents in Investigation and Suspension Docket No. 3337.

R. G. Cobb for protestant.

Carl Giessow for New Orleans, La., Joint Traffic Bureau.

Third Supplemental Report of the Commisison on Reconsideration

Division 4, Commissioners Meyer, Eastman, and Woodlock

Eastman, Commissioner:

In our original report in the title proceeding, 153 I.C.C. 129, we granted a certificate of public convenience and necessity to the Inland Waterways Corporation under section 3 of the Inland Waterways Corporation Act, as amended by the Denison Act, and ordered the establishment of through barge-rail and rail-barge-rail routes and joint rates on classes and commodities over the Federal barge line and connecting railroads, subject to a proviso that no barge-rail route need be established where the short-line all-rail distance via
144 the lines of the rail carriers from point of origin to point of destination through the port of interchange with the barge line exceeds by more than 40 percent the shortest all-rail distance between such points of origin and destination, nor where the shortest all-rail distance between the inland point of origin or destination and the port of interchange exceeds three fourths of the shortest all-rail distance between point of origin and point of destination. Where the short-line all-rail distance from point of origin to point of destination via the port of interchange with the barge line does not exceed the shortest all-rail distance by more than 20 percent, and where the shortest all-rail distance between the inland point of origin or destination and the port of interchange with the barge line is not more than two-thirds of the shortest all-rail distance, we prescribed rates determined by deducting from the all-rail rate between the points of origin and destination a differential of 20 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by the barge line. In all other cases the barge-rail rates prescribed were to be determined by deduction of a differential of 10 percent of the lowest corresponding all-rail rate between the ports.

In accordance with the order above prescribed, respondents filed schedules intended to become effective August 27, 1929, proposing revised class and commodity rates between New Orleans, La., Mobile, Ala., and other ports served by the Federal barge line, on the one

hand, and points in southern territory on the other hand, over barge-rail routes. Upon protest of the Mobile chamber of commerce the operation of the schedules was suspended until March 27, 1930, in Investigation and Suspension Docket No. 3337, and subsequently postponed voluntarily until June 26, 1930.

By agreement of the interested parties the order of suspension was vacated as to a large number of the rates originally included, leaving for consideration here only rates on classes and a number of commodities, including sugar, between New Orleans and Mobile, on the one hand, and points in Florida, Georgia, South Carolina, North Carolina, and Virginia east of a line connecting Atlanta, Macon, and Augusta, Ga., Columbia, S.C., and Marion, N.C. Rates are stated in cents per 100 pounds.

The rates under suspension appear to have been published in strict accordance with our order in ex parte No. 96. They include rates to and from New Orleans via Mobile, Holt, and Birmingport, Ala., as ports of interchange, and rates to and from Mobile via Holt and Birmingport. Because of differences in the all-rail distances from Mobile and New Orleans to the territory involved in this case, and differences in the ratios of port-to-port distances to shortest
145 all-rail distances, it happens that the rates to and from New Orleans are based on a differential of 10 percent or 20 percent of the all-rail port-to-port rate, whereas either no joint barge-rail rates are required between Mobile and the same points or the differential is 10 percent. The result is that in many instances the barge-rail rates to and from New Orleans are lower than barge-rail rates and in some instances lower than the all-rail rates to and from Mobile. This is illustrated by the following rates on sugar, in carloads, to Abbeville, Ga.:

	Cents
From New Orleans, all rail	44
From New Orleans, barge-rail	37
From Mobile, all rail	38
From Mobile, barge-rail (combination)	49

The distances are as follows:

	Via Birmingport	Short-line
	Miles	*Miles*
New Orleans	630	517
Mobile	534	378

All parties agree that such departures from the long-and-short-haul provision should be corrected, but they differ as to the method of correction. The barge line agrees with the respondent rail carriers that barge-rail rates to and from New Orleans via Mobile should be increased where necessary so as to be no lower than the all-rail rates to and from Mobile. As to rates via Holt and Birmingport the barge line and the rail carriers are also in agreement

that the rates to and from Mobile should not exceed those to and from New Orleans but the barge line urges that a parity be brought about by establishing to and from Mobile rates which would be no higher than those produced by the formula above described to and from New Orleans, whereas the rail carriers urge that the latter rates should be increased to an equality with the present Mobile rates. We are of the view that the course urged by the rail carriers would do too great violence to the findings in ex parte No. 96 and would be unwarranted.

The Mobile protestant believes that none of the courses proposed by respondents would avoid undue prejudice to Mobile and preference of New Orleans and that the revision of the suspended rates should do more than merely eliminate fourth-section departures. It states on brief:

"The protestant believe a fair solution of this matter would be the establishment of rates from and to New Orleans under the formulas prescribed in Ex parte 96 with rates from and to Mobile
146 that were fairly related to New Orleans, that is, if the formula fixed a 20% differential rate between New Orleans and a given point, the 20% differential basis should be used between Mobile and that point. If the formula fixed a 10% differential rate between New Orleans and a given point, the 10% differential basis should be used between Mobile and that point."

We deem the present record insufficient to justify our requiring a basis of rates to and from Mobile such as protestant seeks. Section 3 (e) of the Inland Waterways Corporation Act after authorizing hearings concerning the lawfulness of routes, rates, differentials, and divisions prescribed under the summary procedure provided for in the first instance by the same section states:

"At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint."

Although complaints on behalf of shippers are not mentioned, the language above quoted in spirit seems to support the view that the burden of proof would likewise be upon such complainants who allege undue prejudice and preference, just as it is in the case of any complaint setting forth an alleged violation of section 3 of the Interstate Commerce Act. Protestant clearly has not sustained that burden here. Its evidence is very brief, consisting for the most part of comparisons of present and suspended rates from New Orleans with those from Mobile. No distances are shown, nor is there any other evidence to indicate whether or not barge-rail routes to and from Mobile are as economical as those to and from New Orleans. Generally speaking, it appears that the barge movement to and from Mobile is in lower ratio to the total barge-rail service than is the case with respect to New Orleans, and that the barge-rail

routes to and from Mobile represent a greater percentage of circuity than the New Orleans routes. The formula prescribed in Ex parte 96 was designed to reflect both these elements, and we see no reason from the facts now before us to modify it in the manner urged by protestant.

We find that the suspended schedules have been justified except insofar as they include rates which result in departures from the long-and-short-haul provision. The latter rates, we find, have not been justified, and we shall require their cancellation without prejudice to the filing on not less than five days' notice of schedules publishing (a) rates over barge-rail routes to and from New Orleans via Mobile which shall not be lower than all-rail rates to and from Mobile and (b) rates over barge-rail routes to and from Mobile via Holt and Birmingport which shall not exceed rates over
147 barge-rail routes to and from New Orleans via Holt and Birmingport resulting from the findings in Ex Parte No. 96.

An appropriate order will be entered in the suspension proceeding, and the order in Ex Parte No. 96 will be modified so as to permit publication of the rates herein approved in accordance with a stipulation of the parties filed in the instant proceeding agreeing to such modification. Several petitions have been received from railroad respondents in Ex Parte No. 96, calling attention to situations where barge-rail and rail-barge-rail rates to and from certain points of origin and destination resulting from the order in this proceeding are lower than all-rail rates between points of interchange with the barge line and the same points of origin and destination, and asking that the all-rail rates in such instances be observed as minima over barge-rail and rail-barge-rail routes. The modification of the order in ex parte No. 96 here made will cover such situations.

148

Orders

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D.C., on the 15th day of May, A.D. 1930

Ex Parte No. 96. Through Routes and Joint Rates Between Inland Waterways Corporation and Other Common Carriers

Said division, having on the date hereof, made and filed its third supplemental report on reconsideration in the above-entitled proceeding, containing its further findings and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the second ordering paragraph of the order of April 8, 1929, herein, as subsequently amended, be, and it is hereby, further amended by adding at the end of said paragraph the following:

Provided further, That no joint barge-rail or rail-barge-rail rate established under this order to or from any given point of origin or

destination shall be lower than the corresponding all-rail rate between such point of origin or destination and the port of interchange; and provided further, that barge-rail rates between Mobile, Ala., and points in southern territory via Holt and Birmingport, Ala., shall in no case exceed the corresponding barge-rail rates herein prescribed between New Orleans, La., and the same points.

Investigation and Suspension Docket No. 3337. Sugar and Class Rates Between Points in the South via Barge and Rail Routes

It appearing, That by order dated August 26, 1929, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said order, and suspended the operation of said schedules until March 27, 1930, and that said schedules have been voluntarily suspended until June 26, 1930;

It further appearing, That a full investigation of the matters and things involved has been had, and that said division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred
149 to and made a part hereof, and has found with certain exceptions that respondents have justified the schedules under suspension:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel the said schedules, insofar as they propose joint rates in connection with the Inland Waterways Corporation, barge line, that will result in departures from the long-and-short-haul provisions of section 4 of the Interstate Commerce Act, at Mobile, Ala., on or before June 25, 1930, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That the order heretofore entered in this proceeding, suspending the operation of said schedules, designated therein, except as to the schedules mentioned in the next preceding paragraph hereof, be, and it is hereby, vacated and set aside as of June 25, 1930, and this proceeding be discontinued.

By the Commission, division 4.

[SEAL]

GEORGE B. McGINTY,
Secretary.

150 [File endorsement omitted.]

151 *Plaintiff's Exhibit "A"*

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of petition of the American Barge Line Company for the establishment of through rail-barge-rail rates on cotton in carload lots from all points in the State of Arkansas to all points in the States of Pennsyl-

vania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, filed November 2, 1932, in Ex Parte No. 102. Application of American Barge Line Company, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 12th day of January, A.D. 1933.

[SEAL.] (Sgd.) GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

152 Before the Interstate Commerce Commission. Ex Parte 102.
Application of the American Barge Line Company

Petition of the American Barge Line Company for the establishment of through rail-barge-rail rates on cotton in carload lots from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

AMERICAN BARGE LINE COMPANY,
By ANDREW P. CALHOUN,
Vice President.

Dated at Louisville, Ky., October 31, 1932.

May it please the Commission: Comes now your petitioner, the American Barge Line Company, and petitions the Commission to establish through rail-barge-rail rates on cotton in carload lots from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

This request is based upon the provisions of section 3 (E) of the Denison Act, and conditions and necessities now existing.

STATEMENT

The American Barge Line Company has been granted a certificate of public convenience and necessity by the Commission by the original order in this case for operation between Pittsburgh, Pa., and New Orleans, La., and intermediate ports.

The original order in this case fixed reasonable minimum differentials between all rail rates and joint rates in connection with our service on the commodity herein mentioned, and between the territories herein described.

153 Based on this minimum differential the rail carriers supplemented the all-rail cotton tariffs and showed for our account this minimum differential to apply against the then existing all-rail rates.

On August 2, 1932, the southwestern carriers filed their tariff S.W.L. No. 208, I.C.C. No. 2437, naming carload rates between the origin and destination territories herein named, but have not carried forward for our account the minimum differential fixed by the Commission in its order in this case. On the contrary, they petitioned the Commission that we be denied the privilege of partici-

pating in these tariffs. This in itself is an admission on their part that the differential fixed by the Commission should apply in these tariffs until changed by the Commission.

The Commission in its letter of October 21, 1932, denied the petition of the southwestern rail carriers, but at the same time suggested that we file this petition asking for new differentials for our account. A portion of the Denison Act reads as follows:

"The Commission shall in such order fix minimum reasonable differentials between all-rail rates and joint rates in connection with said water service to apply until changed by order of the Commission."

In the order in Ex Parte 102 the Commission complied with this part of the Denison Act, but the railroads have not complied with the order in Ex Parte 102. Under the Denison Act the Commission does not prescribe the rate, but it fixes a differential to apply to rail rates, which differential shall apply until changed by order of the Commission, and in our opinion the increasing or decreasing of a rail rate does not eliminate the participation in this rate by a water carrier, nor in our opinion is it necessary for the water
154 carrier to again petition the Commission to participate in a rate merely because the through all-rail rate has been increased or decreased. If this were the case, a general increase or decrease of rail rates would immediately nullify our certificate of public convenience and necessity and we would again have to ask the Commission to allow us to participate in rail tariffs.

We respectfully submit the foregoing for your consideration, but in order to comply with the wishes expressed in your letter of October 21, 1932, we are herewith filing this petition in order that we may participate in the cotton traffic, to which participation we think we are already entitled.

RATES AND ROUTES SOUGHT

We herein seek an order for the establishment of through rail-barge-rail rates on cotton, carloads, from all points in Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, applicable via rail carriers to Memphis, Tennessee; American Barge Line Company, Memphis, Tennessee, to *Pittsburgh, Pennsylvania; and rail carriers from *Pittsburgh, Pennsylvania, to destination.

We request that the Commission fix the following minimum differentials between the all-rail rates shown in tariff S.W.L. No. 208, I.C.C. No. 2437, in connection with our service:

Cars 40'7" and under	Cars over 40'7"	Differentials
Minimum weight 25,000 lbs	40,000 lbs	11¢ per cwt.
Minimum weight 35,000 lbs	55,000 lbs	10¢ per cwt.
Minimum weight 50,000 lbs	80,000 lbs	9¢ per cwt.

*Including Glassport, Aliquippa, Ambridge, Colona, and Conway, Pennsylvania.

The differentials herein sought were arrived at by applying
155 the formula prescribed in the original order in this case to a theoretical reduced carload all-rail rate between Memphis, Tennessee, and * Pittsburgh, Pennsylvania, our ports of interchange; the theoretical rates being arrived at by reducing the Memphis-Pittsburgh "any quantity" rail rate by the same percentages as the "any quantity" rail rates were reduced in forming the carload all-rail rates Little Rock, Arkansas, to Boston, Massachusetts.

For your information, we understand that the Federal Barge Lines (Inland Waterways Corporation) have agreed with the southwestern carriers, and have established the following differentials on cotton originating in Arkansas, destined to New Orleans, Louisiana.

Cars 40'7" and under	Cars over 40'7"	Differentials
Minimum weight 25,000 lbs.	40,000 lbs.	5¢ per cwt.
Minimum weight 35,000 lbs.	55,000 lbs.	3¢ per cwt.
Minimum weight 50,000 lbs.	80,000 lbs.	2¢ per cwt.
Minimum weight 65,000 lbs.	Capacity of car, but not less than 80,000 lbs.	No differential.

We do not know what method the rail carriers and the Federal Barge Lines used in arriving at these differentials, but undoubtedly the factor of circuity and the measure of the rate must have played an important part. As a concrete example, the all-rail carload rate from Little Rock, Arkansas, to New Orleans, Louisiana, is the same as the all-rail carload rate from Memphis, Tennessee, to New Orleans, Louisiana, and the direct rail line from Little Rock, Arkansas, to New Orleans, Louisiana, does not pass through Memphis, Tennessee. When the Federal Barge Lines pay the rail carriers a division on this traffic up to Memphis, Tennessee, the amount left is so small that the Federal Barge Lines could not afford to make a large differential. On the traffic we desire to participate in, the rail-water-rail route is in line with the all-rail route, and there-
156 fore, petitioner can afford to offer a larger differential.

On August 2, 1932, the southwestern lines issued S. W. L. Tariff No. 208, I.C.C. No. 2437, naming carload rates, which rates became effective September 6, 1932, in spite of tremendous opposition. Petitioner feels that under the order in this case it has a full right to participate in these rates, and is hereto attaching as appendix "A" a schedule setting forth the various steps it has taken to become a party to these rates. As the Commission knows, traffic has been moving and is now moving under the carload rates, and we respectfully request that a hearing not be held, but an order on short notice be issued against the rail carriers directing them to allow us to participate in this traffic.

Your petitioner has equipped itself with terminals, boats, and barges to participate in this traffic.

* Including Glassport, Aliquippa, Ambridge, Colona, and Conway, Pennsylvania.

The rail carriers involved are listed in our original application in this case, and have been furnished with a copy of this petition.

Respectfully submitted.

AMERICAN BARGE LINE COMPANY,
By ANDREW P. CALHOUN,
Vice President.

Louisville, Ky., October 31, 1932.

Appendix A

Date	Subject
Mar. 11, 1932.	Order in Ex Parte 102 issued.
Sept. 7, 1932.	Issuance of Supplement No. 17 to S.W.L. Tariff No. 176-A, I.C.C. No. 2402, providing rates on cotton, any quantity, via American Barge Line Company.
Sept. 19, 1932	Effecitve date of Supplement No. 17 to S.W.L. Tariff No. 176-A, I.C.C. No. 2402.
Aug. 13, 1932	Petition filed by Southwestern carriers to modify Order in Ex Parte 102 requesting that American Barge Line Company be not allowed to participate in reduced cotton rates.
Aug. 31, 1932	Answer of American Barge Line Company to Southwestern Lines' Petition.
Sept. 15, 1932	Informal conference at Washington, D.C., with Mr. Howard Hosmer, attorney and examiner.
Sept. 19, 1932	Letter to Chairman Leland with copies to Chairman Van Ummerson, Morris, and Wilson asking for conference to discuss cotton rates.
Sept. 20, 1932	Reply from Chairman Leland to above letter advising that letter had been passed to a sub-committee for handling. No further advice received.
Sept. 27, 1932	Letter to Chairman Leland requesting a conference for October 3, 1932.
Sept. 29, 1932	Chairman Leland advised he would be in St. Louis on October 3, 1932.
Oct. 3, 1932	Meeting in St. Louis with Chairman Leland and Mr. J. A. Brown, A.V.P., Missouri Pacific Railroad Company.
Oct. 4, 1932	Letter from Mr. Howard Hosmer asking if we had conferred with Southwestern carriers.
Oct. 7, 1932	Letter to Mr. Hosmer advising we had meeting.
Oct. 10, 1932	Letter to Mr. Hosmer suggesting basis of rates.
Oct. 21, 1932	Meeting with Southwestern carriers in the office of Mr. J. A. Brown, A.V.P., Missouri Pacific Railroad Company in St. Louis.
Oct. 21, 1932	Letter from Secretary McGinty stating Southwestern Lines' petition had been denied.

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Plaintiff's Exhibit "B"

Interstate Commerce Commission, Washington

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of

petition of the American Barge Line Company for the establishment of through barge-rail rates on cotton in carload lots from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, filed November 7, 1932, in Ex Parte No. 102, application of American Barge Line Company, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 12th day of January, A.D. 1933.

[SEAL.]

(Sgd.) GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

160 Before the Interstate Commerce Commission. Ex Parte 102.
Application of the American Barge Line Company

Petition of the American Barge Line Company for the establishment of through barge-rail rates on cotton in carload lots from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

Dated at Louisville, Ky., November 5, 1932.

May it please the Commission:

Comes now your petitioner, the American Barge Line Company, and petitions the Commission to establish through barge-rail rates on cotton in carload lots from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

This request is based upon the provisions of section 3 (E) of the Denison Act, and conditions and necessities now existing.

STATEMENT

We respectfully refer you to our petition of the American Barge Line Company, dated October 31, 1932, for the establishment of through rail-barge-rail rates on cotton in carload lots from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

RATES AND ROUTES SOUGHT

We herein seek an order for the establishment of through barge-rail rates on cotton, carloads, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, applicable via American
161 Barge Line Company, Memphis, Tennessee, to * Pittsburgh, Pennsylvania, and rail carriers beyond.

* Including Glassport, Aliquippa, Ambridge, Colona, and Conway, Pennsylvania.

We request that the Commission fix the following minimum differentials between the all-rail rates shown in Agent F. L. Speiden's Tariff No. 216, I.C.C. No. 1477, in connection with our service:

Commodity Description and Minimum Weight	Differential
Description "A" as shown in Item 192¼ of Supplement No. 77 to Agent F. L. Speiden's I.C.C. No. 1477	10¢ per cwt.
Description "B" as shown in Item 192¼ of Supplement No. 77 to Agent F. L. Speiden's I.C.C. No. 1477	10¢ per cwt.

The basis for the differentials herein sought is the same as set forth in our Petition of October 31, 1932.

Your Petitioner has equipped itself with terminals, boats, and barges to participate in this traffic.

The rail carriers involved are listed in our original application in this case, and has been furnished with a copy of this petition.

Respectfully submitted.

AMERICAN BARGE COMPANY,
By ANDREW P. CALHOUN,
Vice President.

Louisville, Ky., November 5, 1932.

162, 163 *Plaintiff's Exhibit "C"*

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of reply of Southwestern Carriers to petitions of American Barge Line Company for the establishment of (1) through rail-barge-rail rates on cotton, in carload lots, from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, dated October 31, 1932, and (2) for the establishment of through barge-rail rates on cotton, in carload lots, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, dated November 5, 1932, and request for hearing upon said petitioners, filed November 14, 1932, in Ex Parte No. 102, application of American Barge Line Company, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 12th day of January, A.D. 1933.

[SEAL.] (Sgd.) GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

164 Before the Interstate Commerce Commission. Ex Parte No. 102. Application of American Barge Line Company

Reply of southwestern carriers to petitions of American Barge Line Company for the establishment of (1) through rail-barge-rail rates on cotton, in carload lots, from all points in the State of

Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, dated October 31, 1932, and (2) for the establishment of through barge-rail rates on cotton, in carload lots, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, dated November 5, 1932, and request for hearing upon said petitions.

R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, C. S. Burg, M. G. Roberts, B. F. Batts, J. P. Stewart, Robt. Thompson, H. H. Larimore, Geo. W. Holmes, Attorneys for Southwestern Carriers, 2008 Mo. Pac. Bldg., St. Louis, Missouri.

November 12, 1932.

165 Before the Interstate Commerce Commission. Ex Parte No. 102. Application of American Barge Line Company

Reply of southwestern carriers to petitions of American Barge Line Company for the establishment of (1) through rail-barge-rail rates on cotton, in carload lots, from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, dated October 31, 1932, and (2) for the establishment of through barge-rail rates on cotton, in carload lots, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, dated November 5, 1932, and request for hearing upon said petitions.

Come now southwestern rail carriers and present the following as their reply to petitions of the American Barge Line Company (hereinafter referred to as Barge Line) seeking differentials under all-rail port-to-port rates (1) rail-barge-rail rates on cotton, in carload lots, from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, which are differentially under the all-rail rates from said origins to said destinations; and (2) the establishment of through barge-rail rates on cotton, in carload
166 lots, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, which are differentially under the all-rail rates now in effect from said origins to said destinations.

An extended reply is unnecessary as the southwestern carriers in their joint and several protest and application for tariff suspension dated St. Louis, Missouri, October 26, 1932 (copy of which is attached hereto as appendix A), filed as protest against supplement 80 to Agent F. L. Speiden's Freight Tariff No. 216, I.C.C. No. 1477, completely and thoroughly sets out the effect differential rates via barge-rail routes will have not only upon the cotton rate adjustment in the Mississippi Valley and southwestern territories, but as

well upon the general conduct of cotton business within the southwestern and southern territories.

As we read the petitions of the Barge Line, the grounds for said differential rates under all-rail rates are, as follows:

1. Complete reliance upon the portion of the Denison Act, which reads as follows:

"The Commission shall in such order fix minimum reasonable differentials between all-rail rates and joint rates in connection with said water service to apply until changed by order of the Commission."

167 2. The fact that the southwestern carriers and the Federal Barge Line (Inland Waterways Corporation) have agreed upon and have established certain differentials on cotton originating in Arkansas when destined to New Orleans, Louisiana.

3. That the establishment by the southwestern carriers, effective August 29, 1932, of carload rates on cotton, and the elimination of minimum differentials, which petitioner alléges the Commission prescribed in its order in this proceeding, are not justified.

4. That petitioner "feels that under the order (Ex Parte No. 102) has a full right to participate in these rates", and requests that no hearing be held, but "an order on short notice be issued against the rail carriers directing them to allow us to participate in this traffic."

Upon the first contention advanced by the American Barge Line in support of its petitions, we cite the Commission's report in I. & S. Docket No. 3399, Cotton and Cotton Linters from Southern and Southwestern States to New Orleans, Louisiana, and Mobile, Alabama, via Rail and Barge Rates, 183 I.C.C. 33, which proceeding had to do with the establishment of rail-barge rates and rates on cotton and cotton linters, any quantity, from points in the South and the Southwest to New Orleans, Louisiana, and Mobile, Alabama, over the Federal Barge Lines operated by the Inland

168 Waterways Corporation, the question presented being what routes and rates, if any, should be established in addition to those already in effect."

In that proceeding, which was not only an investigation and suspension proceeding, but as well included the formal complaint filed by the Inland Waterways Corporation operating Mississippi-Warrior Service et al. v. Abilene & Southern Railway Co. et al., and bearing Docket No. 23188, seeking the establishment of "through rail-barge routes and joint domestic and export rates over such routes on cotton and cotton linters to New Orleans from the Southwest and to Mobile and New Orleans from the South"; and further, alleged that in failing to prescribe rates from the additional points of origin (not embraced by order in Ex Parte No. 96) specified in the complaint, the Commission did not comply with the Denison Act.

The Commission in that case commented as follows:

"The Denison Act authorizes us upon complaint of an interested carrier or carriers, but 'upon reasonable notice, to enter upon a hear-

ing' concerning the reasonableness or lawfulness of any joint rate filed pursuant to orders such as that entered in Ex Parte No. 96, or the reasonableness in minimum differentials between all-rail rates and joint rates in connection with any water service." (Emphasis ours.)

The petitions of the American Barge Line to which this is reply specifically request that no hearing be held, and further than "an order on short notice be issued against the rail carriers directing them to allow us to participate in this traffic."

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Copies of petitions were not served upon any Southwestern line so far as we are able to determine, and copy was only secured upon request after receiving advice through other channels that said petitions had been filed.

Briefly stated, the history of the cotton rates in the Southwest within the past few years is, as follows:

The Commission entered upon an investigation into the cotton rates in its Docket No. 17000, part 3, Cotton, and thoroughly and exhaustively investigated the rates to, from, and within the Southwest, which is reported at 165 I.C.C. 595.

Subsequent to the establishment of the rates prescribed in the last-cited report, on June 15, 1931, a large portion of the cotton movement, amounting in many localities to more than one half the crop, was diverted from the rail lines to unregulated truck and river transportation agencies. The rail carriers immediately set about to retrieve such traffic because of the revenue loss resulting from the handling of this principal commodity of traffic by unregulated forms of transportation.

In consequence of such investigation and study, resort was had to a basis of carload rates which represented a very radical departure from past practice in fixing cotton rates. Such rates were decided upon and published, and because of the agitation that resulted from such publication, the Commission held a hearing at Washington, D.C., on August 17 to 21, inclusive, 1932, to determine whether this new and novel style of freight rates, which were frankly admitted by the carriers to be experimental in nature, should be suspended. The conclusion of the Commission was that such rates seemingly offered the carriers their only opportunity to meet the competitive situation with which they were confronted and the suspension requests were consequently denied.

170

The contention of the Barge Line that they are entitled to differential rates by the provisions of the Denison Act without hearing upon the reasonableness of the differential which they ask to be established under all-rail rates or the resulting barge-rail or rail-barge-rail rates, is fallacious in the extreme: First, for the reason that, as stated above, the present all-rail cotton rates, in effect only since August 29, 1932, are experimental in nature and are published only in an endeavor to retrieve traffic lost to unregulated forms of transportation of which the petitioner is a part; second, that the Denison Act does not require the Commission by mere application alone to

establish differentials under all-rail rates without an investigation into the reasonableness of the differentials and the resulting
171 rates under such differentials.

As to the second contention of petitioner, i.e., that the carriers and the Federal Barge Line have agreed upon certain differentials and rates and routes on cotton moving from Little Rock, Arkansas, to New Orleans, Louisiana, is of no probative force and effect, insofar as the petition of this Barge Line for the establishment of differentials under all-rail rates presently in effect from Memphis and Arkansas points to various Eastern States without hearing into the reasonableness of the differential and the resulting barge-rail and rail-barge-rail rates under such differential.

Because of the experimental nature of the rates which are published to expire on July 31, 1933, and which are compelled rates because of the reduction under the rates prescribed by the Commission in Docket No. 17000, part 3, and only was permitted to become effective upon a full showing of loss of tonnage by reason of much lower rates via other transportation agencies, which lower rates were made by divers means, the rail rates now in effect are of such a nature as to require that the carriers be permitted the completion of its test without the interruption of further reduction by the Barge Line, and the diversion of traffic by such forms of transportation without
172 full proof of the necessity for such differential, and that the differential rates that would result are reasonable and compensatory. This, we submit, can only be determined after a complete investigation and hearing in support of the petitions as filed.

The Barge Line urges its right to a participation in this traffic, and requests that hearing upon its petitions be not held. Such request, we submit, is entirely not in accord with the actual facts surrounding the present rates upon which cotton traffic is moving. The experimental rates of the carriers are low in level. To permit this Barge Line to further reduce the rates from a territory which in scope may be considered to be not only the entire State of Arkansas, but as well a radius of 150 miles of Memphis, the effectiveness of the differential would recreate truck-barge competition, which took from the carriers during the season of 1931–1932 more than one half of the cotton traffic.

The Barge Line asks for rates from all points in Arkansas to all destinations in certain States without any limitation or provision whatsoever that any formula will be followed in making such rates. Applying the formula set up by the Commission in its decision in Ex Parte No. 102 to the point-to-point situations, the Barge Line will not have rates to all such points under the application of the differentials sought.

173 The Commission's attention is directed to the attempt of the Barge Line, through the medium of these petitions, to secure a substantial extension of the origin and destination territory from and to which rates would apply if subjected to the requirements and the restrictions as to circuity and service set up

in the original orders in Ex Parte No. 102. As illustrative of this condition and representing a typical movement, it will be found that the short-line distance from Little Rock, Arkansas, to Boston, Massachusetts, is 1,479 miles, and 50 percent of this distance, 740 miles. The distance from Little Rock to Memphis, Tennessee, is 132 miles, and the distance from Pittsburgh (the port of interchange on the destination end) to Boston is 663 miles, resulting in a total rail distance of 795 miles, or 55 miles in excess of the limitation fixed by the Commission as relating to rail service.

Using Boston as a typical illustration in the heavy consuming territory, it will be found that from Fort Smith the excess distance is 149 miles; Texarkana, 129 miles; Newport, Arkansas, 63; Pine Bluff, Arkansas, 45 miles. From these well-scattered locations it is obvious that under the limitations of the original order in Ex Parte No. 102 very little of the heavy cotton consuming territory would be reached from Arkansas.

These petitions seemingly are an attempt on the part of the
174 Barge Line to secure from the Commission, without the benefit of its usual careful consideration and without the benefit of a public hearing and full information in respect to the public interest in the matter, a basis or system of rates greatly beyond the scope of any system of rates which might be obtained under the limitations which the Commission has seen fit to prescribe for joint-rail and rail-barge rates.

Apropos of the foregoing, it is significant that in the rates that have been published differentially under the any-quantity rates fixed in Docket No. 17000, part 3, supra, and which rates have been accepted by the Barge Line as complying with the Commission's order, no rates are published from any Arkansas origin to the Boston group, which includes a substantial majority of the consuming points to which this cotton moves. This statement may be verified from an examination of Supplement No. 17 to Southwestern Lines' Tariff No. 176-A, I.C.C. No. 2402. It is difficult to conceive on what grounds the Barge Line can contend that it is entitled to participate in joint rail-barge-rail carload cotton rates differentially under materially depressed and competitive all-rail rates, whereas the Barge Line does not and has not contended that it should be permitted to participate in rates made differentially under the reasonable maximum any-quantity rates fixed by this Commission in I.C.C.

175 Following mature consideration by the Commission in a detailed decision and upon a full record, the Commission in Ex Parte No. 102 prescribed certain differential bases to be observed in connection with reasonable maximum all-rail rates, and in its discretion and wisdom, and for the reasonable protection of the rail carriers, laid down specific limitations upon their requirements, insofar as origin and destination territory involved were concerned. Several of these orders, all fashioned after the same pattern, have been vigorously attacked by various river carriers, and this Commission has consistently declined to extend the territorial scope of their

orders. We have here the spectacle of the American Barge Line blandly ignoring the accumulated precedents expressive of the Commission's views in this respect; and in petitions, copies of which were not even served on the Southwestern Lines, asking the Commission to materially extend the scope of its previous orders in the proceeding, selecting as their objectives origin and destination territories of the utmost importance from a tonnage standpoint, without giving the rail carriers their day in court.

Herein and in appendix "A" these rail carriers have portrayed for the Commission a few of the more striking and salient
176 facts which are at once apparent in the consideration of the effects of the granting of the petitions of the American Barge Line. It should be obvious that grave injury, and, in truth, irreparable damage would industiably be done not only to these rail carriers, but also to the interests of their customers—farmers, planters, compress operators, shippers, consuming mills in the Southeast and Carolinas, operators of port facilities, connecting rail lines operating through long-established gateways, and others who use their rails and facilities in the marketing and distribution of the Arkansas cotton crop, which is the most important product in terms of value of any product, agricultural, manufactured, or otherwise, in the State of Arkansas.

With the economic fate of these interests in its hands, it is inconceivable to these carriers that the Commission would arbitrarily and without the benefit of the important information which a full and complete record may reasonably be expected to develop, act in anywise favorably upon the petitions of the American Barge Line. The rail carriers are confident that no such disorderly procedure will follow and feel that enough has been said to indicate to the Commission the extraordinary gravity of the problem which springs from these petitions.

The Southwestern lines feel that, having regard to the char-
177 acter and history of the present carload cotton rates, no differential rates in connection with the Barge Line should be made effective or required by the Commission.

Request that petitions be set down for public hearing

We have hereinabove shown the many interests that are affected by the differential rates which the Barge Line seek, and in view of that showing, Southwestern carriers respectfully urge that the petitions be set down for public hearing or hearings at points within the involved origin area to the end that all interests may have their due right to make known to the Commission in what manner and to what extent their interests may be affected. Such a hearing may confidently be expected to develop important information not now in the Commission's possession, and which will unquestionably merit the most careful scrutiny and study before any profoundly disturbing and obnoxious and prejudicial arrangements such as sought in these protested petitions are seriously considered by the Commission.

The Illinois Central system and other east side lines have authorized the undersigned to say they concur in the position of the Southwestern lines but reserve the right to file a supplemental reply to these petitions.

Respectfully submitted.

178 R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, C. S. Burg, M. G. Roberts, B. F. Batts, J. P. Stewart, Robt. Thompson, H. H. Larimore, Geo. W. Holmes, Attorneys for Southwestern Carriers, 2008 Mo. Pac. Bldg., St. Louis, Missouri.

November 12, 1932.

179 *Appendix "A"*

Before the Interstate Commerce Commission

Application of southwestern carriers for the suspension of certain schedules contained in supplement no. 80 to agent F. L. Speiden's freight tariff no. 216, I.C.C. no. 1477, established to become effective November 10, 1932.

Joint and several protest and application for tariff suspension

R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, C. S. Burg, M. G. Roberts, F. F. Batts, J. P. Stewart, Robt. Thompson, E. A. Smith, H. H. Larimore, Geo. W. Holmes, attorneys for protestants, 2008 Mo. Pac. Bldg., St. Louis, Mo.

October 26, 1932.

180 Before the Interstate Commerce Commission

Application of southwestern carriers for the suspension of certain schedules contained in supplement no. 80 to agent F. L. Speiden's freight tariff no. 216, I.C.C. no. 1477, established to become effective November 10, 1932.

Joint and several protest and application for tariff suspension

Come now The Atchison, Topeka & Santa Fe Railway Company, The Chicago, Rock Island & Pacific Railway Company, The Kansas City Southern Railway Company, Kansas, Oklahoma & Gulf Railway Company, Midland Valley Railroad Company, Louisiana & Arkansas Railway Company, Missouri-Kansas-Texas Railroad Company, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, St. Louis Southwestern Railway Company, Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, Illinois Central Railroad Company, and other

southwestern lines parties defendant to I.C.C. 17000, part 3, Cotton, hereinafter referred to as protestants, and hereby protest against supplement no. 80 to Agent F. L. Speiden's freight tariff no. 216, I.C.C. no. 1477, particularly as to item 4-A on page 9 thereof, which is as follows:

181 *Nonapplication of rates*

Item	Via—	From—	To—	Application or exception
4-A (Cancels item 4 of supplement 63).	ABL	Memphis, Tenn.	Stations in Ohio, except Painesville on and east of the line of the Erie, Phalanx, Ohio, to Youngstown, Ohio, inclusive, P. & L. E., Youngstown, Ohio to Pa.-Ohio State line, inclusive, and stations located in States of Penna., N.Y., N.J., Conn., Mass., and R.I.	Rates apply only as provided in item 101 and only via Glassport, Pa. Note.—Aliquippa and Ambridge, Pa., eliminated.

182 and Item 101-A on page 14 thereof, which is as follows:

"Item 101-A. (Cancels item 101 of supplement 63). Basis for rates in connection with ABL and rail lines parties hereto or as same may be amended. (See item 4-A.)

"Rates on cotton, in bales, as described in item 190 to points named in item 4-A from Memphis, Tenn., are the through rates shown in tariff, as amended, less a differential of 15 cents per 100 pounds, subject to exceptions shown below:

"Rates on cotton, in bales, as described in item 192-A (descriptions A and B) to points named in item 4-A from Memphis, Tenn., are the through rates shown in tariff, as amended, less a differential of 15 cents per 100 pounds on description A, and 17 cents per 100 lbs. on description B, subject to exceptions shown below.

"(a) While shipments moving under the rates herein authorized, are in possession of ABL, the bill of lading, terms and conditions of that line as set forth in their circular 3, I.C.C. 4, supplements thereto or successive issues thereof will govern." (In compliance with order of the Interstate Commerce Commission in Ex Parte 102 of May 19, 1932.)

and protestants request, pursuant to the provisions of paragraph (7) of section 15 of the Interstate Commerce Act, that the Interstate Commerce Commission, by its order, suspend the operation of such tariff and all schedules therein contained pending hearing thereon and investigation thereof by this Commission. In support of this protest and request for suspension, your protestants respectfully represent and show unto the Commission as follows:

I. *History of Present Rates*

183 On June 15, 1931, there became effective between points in the United States a revised basis of freight rates on cotton in compliance with the orders of the Interstate Commerce Commis-

sion in Docket 17000, part 3, Cotton, 165 I.C.C. 595. Subsequent to the establishment of these rates and during the cotton season of 1931–1932, a large proportion of the movement, amounting in many localities to more than half the crop, was diverted from the rail lines to unregulated truck and river transportation agencies. The investigation which the carriers made of the competitive situation thus brought about developed that the level of the rates necessary to retrieve the traffic would be so low that there would be serious doubt as to whether, or not, the revenues therefrom would be remunerative if the traffic were handled on the usual basis, i.e., any quantity cotton rates. In consequence, resort was had to a basis of carload rates, a very radical departure from past practices. A great deal of agitation followed as a result of which the commission held hearings at Washington, D.C., on August 17th to 21st, inclusive, 1932, to determine whether this new and novel system of freight rates, which was frankly admitted by the carriers to be experimental in nature, should be suspended. The conclusion of the Commission was that such rates seemingly offered the carriers their only opportunity to meet the competitive situation with which they were confronted and the suspension requests were consequently de-
184 nied. In passing, but of no little importance, may be mentioned the fact developed at the hearing above referred to that the American Barge Line, by means of secret rates, private contracts, unregulated and unrestrained practices, was the leading and chief competitor in the movement of cotton from Memphis, Tenn., to the Gulf. From New Orleans, the cotton was moved by unregulated steamship lines to Atlantic seaports and thence to other destinations by truck from such ports to interior consuming points.

Having established this revised scheme of carload freight rates from Memphis and surrounding territory on both sides of the river, effective August 29, 1932, the rail carriers find that the freight rates which they set up to meet unregulated and secret rates of the American Barge Line for the movement of this traffic have now been used as the basis for establishing differential rates upstream from Memphis in connection with the American Barge Line to Glassport (Pittsburgh), Pa., and thence rail connections to New England destinations.

By item no. 101-A appearing on page 14 of Agent Speiden's Supplement No. 80 to Tariff No. 216, I.C.C. No. 1477, it is provided as follows: "Rates on cotton, in bales, ——— are through rates shown in tariff, as amended, less a differential of 15 cents per 100 pounds on description A (cotton delivered compressed, not including
185 cost of compression), and 17 cents per 100 pounds on description B (including 12 cents per 100 pounds, compression cost) ———."

The present all-rail rate on cotton delivered carrier compressed, or uncompressed, not including any cost for compression, from Memphis, Tenn., to Boston, Mass., is 74 cents per 100 pounds, minimum weight 37,500 pounds per car.

The present all-rail rate on cotton delivered carrier in uncompressed bales to be compressed in transit is the cost of compression, i.e., 12 cents per 100 pounds higher than the rate on cotton delivered carrier compressed, or 86 cents per 100 pounds; the 12-cent figure mentioned being the actual cost of compression, and the entire amount is paid over by the rail carriers to the compress company for such service.

Item 101-A carries the further note: "In compliance with order of the Interstate Commerce Commission in Ex Parte 102 (application of American Barge Line, 182 I.C.C. 521) of May 19, 1932." The presumption attaching to such statement is that the differentials of 15 and 17 cents per 100 pounds under all-rail rates is the establishment of a 20 percent differential of the port-to-port all-rail rate upon what is generally termed the Ex Parte No. 96 formula (through routes and joint rates, 153 I.C.C. 129). As a matter of fact the flat application of the 15- and 17-cent differentials create differentials in excess of 20 percent.

186 The present all-rail rates on cotton from Memphis, Tenn., and the Southwest to the entire Central Freight Association and Eastern Trunk Line territories and Canadian mill points are blanketed. The 74-cent rate to Boston and other eastern points is applied as a maximum rate at intermediate points in all of said destination territory.

Theoretically the 15- and 17-cent differentials, which the barge line here proposes, are in accord with the ex parte 96 formula (or 20 percent of the all-rail port-to-port rate) because, due to the application of the all-rail rates from the Memphis-Little Rock group to this large destination territory on a blanket basis, the port-to-port rate from Memphis to Pittsburgh happens also to be 74 and 86 cents, respectively. However, protestants do not feel that it is just to apply the percentage differential to the present all-rail rates which are only effective at intermediate points because of observance of the provisions of the fourth section of the act. Further, it was certainly neither the intent of Congress, or the Commission, that charges collected by carriers for compression and by them paid to the compress in toto should be used as a measure for differential water rates. The application of the 20 percent formula to the 86-cent rate, which is actual cost of compression of 12 cents plus the 74-cent

187 rate, when used as a measure for the 17-cent differential makes the differential in fact approximate 23 percent instead of 20 percent.

Under this application of a rate 17 cents per 100 pounds less than the all-rail rate of 86 cents on cotton with carriers privilege of compression, the American Barge Line is, in fact, applying 20 percent of the actual compression cost paid to the compress and thereby nullifies the 15-cent differential in connection with the 74-cent rate. As an example, under the 15-cent differential, cotton delivered to the American Barge Line by shipper in compressed bales would actually cost such shipper the charge for compression of 12 cents per

100 pounds plus the barge-rail rate of 59 cents per 100 pounds (15 cents under all-rail rate of 74 cents), or a total of 71 cents through from Memphis, Tenn., to point of destination. Whereas, if the same cotton were delivered to the American Barge Line in uncompressed bales with instructions that such cotton be compressed in transit, this cotton would be then handled from Memphis, Tenn., to destination at rate of 69 cents per 100 pounds (17 cents under all-rail C.I.T. rate of 86 cents), out of which the American Barge Line would pay to a compress company actual cost of compression of 12 cents per 100 pounds. Under the latter handling, a saving of 2 cents per 100 pounds would accrue to the shipper over and above what he would pay if cotton were handled under the 15-cent differential
188 basis. It is evident that this plan of handling would be adopted by the shippers and that, as stated above, the differential, instead of being 20 percent under the port-to-port all-rail rate, would be approximately 23 percent thereof.

Protestants maintain that, in view of the fact that the present cotton rates are compelled rates and designed and permitted to become effective as an experimental measure to permit the carriers a participation in the cotton transportation, there is no justification for any differential barge-rail under all-rail rates.

II. No notice to public was given of the proposed change in rates

Both by custom and agreement with organized shippers, any material change in the freight rate structure must be placed on the public docket of the various freight bureaus for discussion. This tariff, since it will change the entire flow of cotton traffic, is certainly a material change. Nevertheless, this change was not docketed and, as a matter of fact, even the subscribing rail carriers were unaware of its publication, being unable to check incoming tariffs as carefully as they should due to the financial stringency.

III. Proposed basis of rates will cause reestablishment of extensive truck competition

189 By the experience of the southwestern carriers during the cotton season of 1931–32, if the proposed rates are permitted to become effective, cotton from the producing area within 150 miles radius of Memphis will move to Memphis by truck.

Memphis, Tenn., is the largest interior cotton market in the world from which point cotton moves to all consuming points of the globe. On the initial move from the producing point in Arkansas, Mississippi, etc., into Memphis, Tenn., the owner of such cotton does not at that time know to what point that cotton may finally move. Past experience developed that where a very low rate was in effect from Memphis, Tenn., to any given destination via transportation agencies other than rail carriers, it was more advantageous to the owner of cotton to see that the cotton was delivered at Memphis,

Tenn., free from any rail regulations requiring that the cotton be reshipped from Memphis, Tenn., via rail lines. For example, last season when the barge rate to New Orleans was drastically cut, this so-called free cotton in storage at Memphis increased from 106,886 bales to 646,116 bales. Such cotton demanded a premium over cotton brought into Memphis, Tenn., by rail lines, due to the fact that while rail carriers published so-called "floating-in" rates which are materially lower than local rates, such floating-in rates while
190 applied to the initial move to transit point are contingent upon the cotton moving out of Memphis, Tenn., via rail lines and if cotton moving under such floating-in rates in the first instance does not eventually move out by rail lines, carriers, under the tariffs as published, require that such floating-in charges be increased to full local rates, which are today on basis of the rates prescribed by the Commission in Docket 17000, part 3. The floating-in charges as applied to the initial move to transit point were designed to be approximately the amounts charged by unregulated trucks for that movement by such unregulated carriers. If this low basis of rates is permitted to become effective via the American Barge Line, we will have, in effect, such a situation as mentioned above whereby a much lower rate than the all-rail rate would be in effect via transportation agencies other than rail, and would be a compelling reason why free or nonrail cotton would demand a premium.

IV. Will strip interior smaller markets of cotton and destroy their usefulness

The 1932 cotton crop is estimated at 11,425,000 bales.

The production within 150-mile radius of Memphis is conservatively estimated at 20 percent of such total production.

191 The low barge-rail rate from Memphis to Eastern destinations will attract cotton from natural markets. As the Commission is aware from previous records, much of the cotton crop is purchased at or near the point of production by local buyers at the larger inland towns or villages. Nearly every town within the area of production large enough to support one or more cotton gins has its quota of cotton buyers. Under the rates here proposed such cotton will be trucked by independent truckers direct to Memphis for concentration to be in a position to obtain premiums offered for free or nonrail cotton so as to take advantage of the low barge-rail rate here proposed, thereby depriving the producers at the smaller markets of competitive buying and also destroying the markets at these smaller points. To follow up what we have said in the discussion under title III, cotton moving by unregulated truck from the country station to Memphis, Tenn., moves at a very low rate which is not tied up with or contingent upon the movement from Memphis, Tenn., being via any certain transportation agency, and, therefore the rate as paid to the nonregulated truck in the first instance is a final charge paid. If movement into

Memphis, Tenn., is by rail and the outbound movement does not meet the requirement of the tariffs, the inbound floating-in charges originally assesed by rail lines, as before stated, will be increased to the full local rates.

192 It must be borne in mind that cotton gin points are the primary markets and are not to be confused with compress points. There are literally hundreds of such primary markets within a radius of 150 miles of Memphis.

V. Will destroy the usefulness of interior compresses and the value of investments therein

Compress points located in the Southwest within radius of 150 miles of Memphis, Tenn., are: Caruthersville and Malden, Mo., Blytheville, Leachville, Jonesboro, Marked Tree, Truman, Walnut Ridge, Newport, Earle, Mariana, West Memphis, Helena, Pine Bluff, Cotton Plant, Searcy, Batesville, Morrillton, Conway, Little Rock, North Little Rock, McGehee, Forrest City, and Crossett, Arkansas, at which points cotton is received for concentration, compression, and/or storage. For the same reasons as expressed in connection with the destruction of competitive buying referred to in the next above paragraph, each of the points named above has one compress and several of them, two or more. Investments in these plants total millions of dollars which would virtually become useless if the flow of traffic is diverted as would be the result if this tariff is permitted to become effective.

193 We have hereinabove, under title I, shown the probable effect of the proposed rates upon cotton movements—how the published differentials of 15 and 17 cents under the effective port-to-port all-rail rates will in practical effect be in excess of such amounts and will exceed 20 percent thereof—how such differentials will, inevitably, change the flow of traffic which cannot but effectually destroy the interior compresses and the primary markets.

VI. Upsets cotton rate adjustments

The New England States and southeastern mills are in direct competition with each other and, under the present adjustment of all-rail rates, enjoy a relationship under which one group of mills can compete freely with the other. The present rate adjustment preserves a delicate balance which permits free competition and flow of the traffic without prejudice or preference to all consuming points. The present low price of cotton makes it all the more easy to disturb this adjustment, the difference of a few cents a bale in transportation costs looming much larger than the same difference would be were the price of cotton normal. The reduction proposed of 17 cents per 100 pounds amounts to approximately 85 cents per bale. This is an appreciable percentage of the present market value of the bale and sufficient to cause maladjustment in the rates to the Southeast

and Carolinas versus New England mill points and a possible disruption of the entire cotton rate structure in an attempt
194 to regain the delicate rate balance necessary for the free flow of the traffic.

In addition there is a serious menace in the rates to the New England consuming territory itself in that the present movement consists of either an all-rail movement from Memphis, or a rail and/or water movement from Memphis to New Orleans, thence to the New England ports by unregulated coastwise steamers. Undoubtedly, if the present adjustment is disturbed so that an undue amount of the traffic moves from Memphis north on the river through Pittsburgh, the coastline steamers operating out of New Orleans will not be slow to retaliate by a reduction in rates, whereupon pressure will be brought to bear by the port interests for both a lower rate on the river and thereby compel a lower rail rate into ports. Thus we begin a vicious cycle in which the rail carriers are caught between the upper and nether mill stone, the water carriers Memphis to Pittsburgh reducing their rates, forcing the rail carriers to join them, followed by a reduction of the coastwise steamers from New Orleans, forcing a reduction in the rail rate to New Orleans, presently followed by another reduction in the barge-rail rates, Memphis to Pittsburgh, and another reduction in coastwise steamers, and so on ad infinitum.

VII. Proposed rates will create fourth section violation

195 Rates which are published in connection with the American Barge Line on the basis prescribed in Ex Parte No. 102 are protected as regards fourth section departures resulting therefrom by fourth section order no. 10953.

It is apparent from a superficial analysis of this publication that it transcends the limitations or provisions of the authority and requirements as to joint rates contained in the Commission's decision in Ex Parte No. 102, and it necessarily is without fourth section relief, inasmuch as the relief contained in F.S.O. no. 10953 protects only departures which result from compliance with the Commission's order.

VIII. The present cotton rates are experimental

As before stated, the present cotton rates within and to and from the Southwest, which became effective August 29, 1932, will expire July 31, 1933. The intent of such rates was to determine the ability of rail carriers to compete in the transportation of cotton as against the unregulated forms of transportation with which such disastrous experience was had during the season of 1931–1932, when the rail rate structure then effective was that which the Commission had prescribed in its Docket 17000, part 3. In considering the proposals of the American Barge Line in the tariffs here under con-

sideration sight should not be lost of the fact that the South-
196 western carriers are undertaking an experiment. If that experiment is to be continually deflected or disturbed by disruptions of the basic structure such as here proposed, it will be wholly impossible for any definite conclusion to be drawn therefrom.

CONCLUSION

In view of the foregoing and being of the opinion that the rates announced by the American Barge Line and contained in supplement no. 80 to Agent F. L. Speiden's Tariff No. 216, I.C.C. No. 1477, will tend to create an unjustifiable condition in the rate structure, your petitioners respectfully urge that the Commission by its order suspend said schedules and enter upon an investigation as to the lawfulness thereof, and that at the conclusion of such investigation find that such schedules have not been justified, are unlawful, and in an order require the same to be canceled.

Respectfully submitted.

The Atchison, Topeka and Santa Fe Railway Company, by R. G. Merrick, Assistant Freight Traffic Manager; The Chicago, Rock Island & Pacific Railway Company, by G. E. Schnitzer, Assistant Freight Traffic
197 Manager; The Kansas City Southern Railway Company, by J. R. Mills, Assistant Freight Traffic Manager; Kansas, Oklahoma & Gulf Railway Company, Midland Valley Railway Company, by R. H. Schultz, Traffic Manager; Louisiana & Arkansas Railway Company, by F. A. Key, Jr., Traffic Manager; Missouri-Kansas-Texas Railroad Company, by R. C. Trovillion, Freight Traffic Manager; Missouri Pacific Railroad Company, by D. R. Lincoln, Freight Traffic Manager; St. Louis-San Francisco Railway Company, by R. N. Nash, Freight Traffic Manager; St. Louis Southwestern Railway Company, by W. F. Knobeloch, Traffic Manager; Texas and New Orleans Railroad Company, by
198 Joseph Lallande, General Freight Agent; The Texas and Pacific Railway Company, by C. Schonfelder, General Freight Agent; Illinois Central Railroad Company, by Joseph Hattendorf, Assistant Freight Traffic Manager; R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, C. S. Burg, M. G. Roberts, B. F. Batts, J. P. Stewart, Robt. Thompson, E. A. Smith, H. H. Larimore, Geo. W. Holmes, Attorneys for Protestants, 2008 Mo. Pac. Bldg., St. Louis, Missouri.

October 2, 1932.

199 *Plaintiff's Exhibit "D"*

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of reply of the Illinois Central Railroad Company, et al. to the petitions of the American Barge Line Company, filed November 17, 1932, in Ex Parte No. 102, Application of American Barge Line Company, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 24th day of February, A.D. 1933.

[SEAL.]

(Sgd.) GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

200 Before the Interstate Commerce Commission, Ex Parte No. 102, Application of American Barge Line Company

Reply of the Illinois Central Railroad Company, the Yazoo and Mississippi Valley Railroad Company, Southern Railway Company, Louisville & Nashville Railroad Company, St. Louis-San Francisco Railway Company, Gulf, Mobile and Northern Railroad Company, New Orleans Great Northern Railroad Company, Columbus and Greenville Railway Company, and Mississippi Central Railroad Company, supplemental to the reply heretofore made on behalf of the southwestern carriers, to the petitions of the American Barge Line Company for the establishment of (1) through rail barge-rail rates on cotton, in carload lots, from all points in the State of Arkansas to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut (petition date October 31, 1932), and (2) for the establishment of through barge-rail rates on cotton, in carload lots, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut (petition dated November 5, 1932), and request for hearing upon said petitions.

W. N. MCGEHEE,
W. A. NORTHCUTT,
M. G. ROBERTS,
ELMER A. SMITH,
Attorneys for Respondents.
#135 East Eleventh Place, Chicago, Illinois.

November 14, 1932.

201 The southwestern rail carriers prepared under date of November 12, 1932, a reply to petitions of the American Barge Line Company, seeking establishment of (1) through rail barge-rail rates on cotton, in carload lots, from all points in the State of Arkansas to all points in the States of Pennsylvania, New York,

New Jersey, Massachusetts, Rhode Island, and Connecticut (petition dated October 31, 1932), and (2) through barge-rail rates on cotton, in carload lots, from Memphis, Tennessee, to all points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut (petition dated November 5, 1932).

It was stated on page 13 of the reply filed on behalf of the southwestern carriers to these petitions that the Illinois Central system (composed of the Illinois Central Railroad Company and The Yazoo and Mississippi Valley Railroad Company) and other east side lines, had authorized the southwestern lines to say that the former concurred in the position of the southwestern lines but reserved the right to file a supplemental reply to these petitions.

The carriers filing this supplemental reply, viz, the Illinois Central Railroad Company, The Yazoo and Mississippi Valley Railroad Company, Southern Railway Company, Louisville & Nashville Railroad Company, St. Louis-San Francisco Railway Company, Gulf, Mobile and Northern Railroad Company, New Orleans Great Northern Railroad Company, Columbus and Greenville Railway Company, and Mississippi Central Railroad Company, heretofore referred to as the east side lines, approved of everything said in the reply dated November 12, 1932, of the southwestern lines. The east side
202 lines in this supplemental reply direct the Commission's especial attention to the policies and practices of the American Barge Line Company as brought out in hearings that have recently been held respecting the rates on various commodities in the Mississippi Valley territory. The east side lines also suggest some additional considerations that in their judgment the Commission should have before it in passing upon the petitions of the American Barge Line Company.

The American Barge Line Company is the most notorious rate-cutter on the Mississippi and Ohio Rivers. It is one of the water carriers that have been demoralizing the rate situation on the Ohio and Mississippi Rivers on coffee, sugar, cotton, and other commodities. It has formally voiced its opposition to the regulation of its port-to-port rates. It insists it must be in a position to change its port-to-port rates from week to week, from day to day, from hour to hour, and from minute to minute as conditions in its judgment require. It makes what one of its own officers described as "confidential rates." It refuses to state what those rates are. It is in these days engaging in the very practices that gave rise to the Interstate Commerce Act, and it asks the Commission to protect and aid it in these practices. It asks the Commission to require the rail carriers to continue the all-rail rates on such a level as will drive the traffic from the rail routes to the water route of the American Barge Line Company. It insists that it must have differentials on its port-to-port traffic that greatly exceed the standard differential of 20 percent. The greater the differential the greater the opportunity the American Barge Line Company possesses of continuing its reprehensible practice of making what it terms as "confiden-

203 tial rates", rates which vary from day to day as between shipper and shipper, dependent upon nothing except the mere whim and caprice of the American Barge Line Company. What the American Barge Line Company seeks in substance is the destruction and ruin of the rail carriers. There cannot be any doubt about its purpose as exemplified in the practices that it is now pursuing and the principles that it so flagrantly advocates.

There is now pending before the Commission fourth section application no. 14734 of the Illinois Central Railroad Company and The Yazoo & Mississippi Valley Railroad Company, in which these carriers ask for fourth-section relief in respect to the rates on petroleum and petroleum products from shipping points in the New Orleans-Baton Rouge group to Memphis, Tennessee, Paducah, Owensboro, and Louisville, Kentucky. The hearing in this proceeding was held in New Orleans, Louisiana, on July 18–21, 1932. At that hearing Mr. A. P. Calhoun, vice president in charge of traffic of the American Barge Line Company, appeared and offered testimony in opposition to this application (trans. 273).

Mr. Calhoun stated on cross-examination (trans. 282–283) that the American Barge Line Company was moving oil from New Orleans to Pittsburgh, Pennsylvania, from Louisville to Ashland, from Parkersburg to Wierton, and to a great many other points, that these movements are covered by private contracts and not by published tariffs, that as the charges are contract charges he did not care to give them, that the American Barge Line Company operates its port-to-port business on the basis of such rates as it fixes from time to time, that it is in a position to charge and actually does
204 charge rates dependent upon particular conditions as they arise (trans. 286), and that the American Barge Line Company is asking the Commission through the power the Commission has to regulate rail rates, to protect the American Barge Line Company with respect to its unregulated traffic. He voiced his vigorous opposition to the regulation of the port-to-port traffic of the American Barge Line Company.

Mr. Calhoun went on to state in answer to further questions that the port-to-port rate on petroleum of the American Barge Line Company between Louisville and Memphis was a contract rate, that it had no relationship whatever to the rail rate, and that as the rate was a "confidential rate" he did not wish to name it.

The American Barge Line Company thus asks the Interstate Commerce Commission to regulate the all-rail rates of the rail carriers so as to require the maintenance of these rates upon a level that will divert all the traffic from the all-rail routes to the water route of the American Barge Line Company. The American Barge Line Company asks the Commission, in short, so to regulate the rates of the all-rail carriers as to destroy the very subject of regulation, the railroad system of the United States. That this is the aim and purpose of the American Barge Line Company is perfectly clear

from the practices that now characterize its operation, on the Ohio and Mississippi Rivers. But in view of these practices the east side lines submit that the Interstate Commerce Commission should be extremely reluctant, without a full hearing and without knowledge of all the surrounding facts and circumstances, to enter an order requiring the establishment of joint through routes and rates with the American Barge Line Company on cotton which are based
205 upon the very rates that were established to meet the competition of the American Barge Line Company and other unregulated agencies of transportation.

The testimony of Mr. Calhoun in the case just referred to shows that the American Barge Line Company makes no pretense of maintaining its port-to-port rates on the basis of the 20 percent standard differential. The higher the rail rate the greater of course becomes the barge differential when based upon the 20 percent basis, and the greater the standard differential becomes, the wider opportunity the American Barge Line Company has and the greater leaway it possesses in the establishment of its "confidential rates" on port-to-port traffic.

It is amazing that in this era and after some fifty years of regulation of railroad rates by the Interstate Commerce Commission, the American Barge Line Company should appear before the Commission, the tribunal that owes its very existence to the fact that prior to the time the Interstate Commerce Act was passed the rail carriers in this country were in a position to do precisely what the American Barge Line Company is now in a position to do—to change its rates overnight, to make rates for one shipper lower or higher than those that are made for another shipper on the same commodity moving from and to the same points, to change its rates from time to time dependent upon conditions as they arise, and to make its rates dependent upon the quantity offered, and should virtually ask
206 the Commission to protect the American Barge Line Company in a continuance of the very practices that gave rise to the enactment of the Interstate Commerce Act.

The Commission concluded on November 3, 1932, a hearing in I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Ports, involving the propriety of reduced rates on sugar proposed by the southern carriers from refining points in southern territory, including refining points in the New Orleans district. The sugar refineries in the New Orleans district are all located on the Mississippi River and are reached by the barge lines that operate on the Mississippi River, including the American Barge Line Company.

It was brought out at this hearing that although the all-rail rate on sugar from New Orleans to Evansville, Indiana, is at the present time 51 cents, and the water rate, based upon the standard differential of 20 percent, would be 40 cents, the American Barge Line Company on June 9, 1932, openly quoted a rate of 25 cents f.o.b. barge New Orleans to on-board cars or into a warehouse at Evansville, and a rate of 22 cents f.o.b. barge New Orleans to f.o.b. barge

Evansville. The American Barge Line Company, in other words, so far as the rate of 25 cents is concerned, was quoting a rate that was just about 50 percent of the all-rail rate. The American Barge Line Company quoted the same rates of 25 and 22 cents, respectively, from New Orleans to Louisville. The all-rail rate on sugar from New Orleans to Louisville at the present time is 54 cents.

The American Barge Line Company in a letter dated June 7, 1932, addressed to the president of the Mississippi Valley Barge Line Company, actually stated that there are certain commodities, comparatively few in number, which move in large
207 volume from port to port, that are bound to move at a rate materially lower than the 80 percent basis.

The foregoing will indicate to the Commission the character of the competition that the rail carriers in the Mississippi Valley and the southwest are now encountering from the American Barge Line Company. It is unfair, it is ruthless, it is destructive, and the rail carriers must look to the Commission for support and help against the operations of such a company as the American Barge Line Company. We recognize, of course, that the Commission lacks the power to regulate these common carriers on water as it regulates common carriers by rail, but the Commission has the power to determine to what extent through routes and joint rates between the rail and these water carriers will be reasonable, and to fix reasonable minimum differentials.

The American Barge Line Company is in a position to follow and does follow what has recently been described by the California Railroad Commission (investigation into the operation of the various transportation systems doing business in the State of California, decision dated October 10, 1932), as the "law of the jungle." The rail carriers are not permitted to follow that law. Their acts and their practices must conform to the standards laid down in the Interstate Commerce Act. But we do not believe that the Interstate Commerce Act leaves the rail carriers entirely helpless before the onslaughter of these unregulated lines. We do not believe that the Interstate Commerce Act is an effective weapon only in the hands of these unregulated lines or that it should be construed
208 as these barge lines contend it should be construed so as to bring about the destruction of the very subject of regulation. We believe that the Interstate Commerce Act still affords some measure of protection to the all-rail carriers in the situations that have recently developed, including the present one, which all have their origin in the practices that are now being pursued by these unregulated agencies of transportation.

The last side lines are of the deep conviction, when consideration is given to the character of the present rates on cotton, the circumstances that prompted their publication, the purposes which the carriers had in establishing them, and their level, that the law does not require the establishment of through routes and joint rates in connec-

tion with the American Barge Line Company on the basis of the present rates on cotton. In any event this should not be done in the absence of a hearing by which the Commission can fully inform itself respecting the facts, the necessity, if any, on the part of the American Barge Line Company for any differential under the present rates, the available traffic, the agencies of transportation by which that traffic is now being moved, the effect of a differential basis on the rail carriers, and all other pertinent facts and considerations.

The rail carriers, in an effort to save themselves from ruin itself, a ruin brought about by the policies that the American Barge Line Company is now pursuing and by the practices that it is following, last summer reduced the rates on cotton, a commodity that constitutes a substantial part of their tonnage, in an effort to place
209 their all-rail routes on more of an equality with the competing routes of unregulated carriers, including particularly the competing routes of the American Barge Line Company, and to give those all-rail routes an equality of opportunity with the competing routes of the unregulated carriers. These rates took effect on August 29, 1932. Prior to the time they took effect a hearing was held at Washington, D.C., before the Commission to determine whether these rates should be suspended, and, as pointed out by the southwestern lines in their reply (page 6) the conclusion of the Commission was that these rates seemingly afforded the carriers their only opportunity to meet the competitive situation with which they were confronted. The requests for suspension were denied.

Notwithstanding the circumstances under which these rates were published and the purpose of the carriers in publishing these rates, the American Barge Line Company now appears and has the temerity to ask the Commission, in the absence of a hearing, and without a full disclosure to the Commission of the surrounding facts and circumstances, and the effect upon the rail carriers of the proposals of the American Barge Line Company, to require the rail carriers to establish through routes and joint rates in connection with the American Barge Line Company that are predicated upon the rates that were reduced by the rail carriers for the purpose of meeting the competition engendered by the unfair and unjust practices of the American Barge Line Company. If the request of the American Barge Line Company is complied with the result will be to thwart the very purposes of the carriers in establishing these rates on
210 cotton, and to deny the carriers the opportunity which the Commission found they should have of establishing rates that will give the all-rail routes an equality of opportunity with competing water routes.

The unfairness and injustice to the rail carriers of this request is apparent, and the fact that the request comes from a company that indulges in such practices as characterizes the operations of the American Barge Line Company ought in and of itself to be sufficient to convince the Commission that the rail carriers are in any

event entitled to a hearing before a system and basis of through routes and joint rates with the American Barge Line Company is established that will result in further serious injury to the rail carriers and in a greater impairment of their revenues.

The American Barge Line Company has no moral and we believe no legal right to ask the Commission for differentials below the rates which the American Barge Line Company helped to create, and which the Commission permitted the rail carriers to establish to the end that the rail carriers might place the all-rail routes on more of an equality so far as the costs of transportation are concerned, with the water routes of the American Barge Line Company.

There is another factor that the Commission should bear in mind in considering these petitions of the American Barge Line Company, a factor which in the judgment of the East Side Lines is controlling. The water route of the American Barge Line Company from Memphis to Pittsburgh is not a practicable one for cotton from a service standpoint, and the East Side Lines are convinced that the transportation of cotton by the American Barge Line Company up the
211 Mississippi River and the Ohio River cannot under the circumstances possibly be any cheaper than the cost of transporting cotton via the all-rail routes. Before the Commission requires the establishment of a differential basis of joint through rates in connection with the American Barge Line Company, that company should be required to prove that the costs of transportation via the routes proposed by the American Barge Line Company are less than the costs via the all-rail routes.

As stated by the Commission in War Department vs. A. & S. Ry. Co., 77 I.C.C. 317 (p. 322), the port-to-port rates of the Federal Barge Line were established by the Railroad Administration upon the inauguration of water service and in all instances were made 80 percent of the corresponding rail rates with the exception of coal on the Warrior River. This differential basis has been adhered to by the Commission. It has had occasion to point out in one case that the record was admittedly lacking in any reliable evidence as to the cost of transportation (Inland Waterways Corporation vs. C. G. W. R.R. Co., 129 I.C.C. 521), while in another case it has had occasion to criticize the cost figures offered to support the 20 percent differential basis (Cotton and Cotton Linters, 183 I.C.C. 33).

In a recent decision of the Commission, Inland Waterways Corporation vs. A. G. S. R.R. Co., et al., 151 I.C.C. 126, the Commission said (p. 144):

"The barge-line differentials are based upon the premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost."

212 The Interstate Commerce Commission ought not in these days and under the conditions now existing to require the rail

carriers to join in through routes and joint rates with a water carrier which are less than the all-rail rates, in the absence of clear and convincing proof by the water carrier that the cost of transporting the traffic in connection with the route of the water carrier is less than the cost of transporting the traffic via the all-rail route. Obviously, this is a question that can only be determined after a hearing.

The east side lines therefore submit that they should not be required to enter into through routes and joint rates with the American Barge Line Company as prayed for in the petitions herein in the absence of a showing by the American Barge Line Company given in a formal hearing that the cost of transporting cotton via the proposed routes is less than the cost of transporting cotton via the all-rail routes. The present basis of differentials is wholly an arbitrary one and not based on either fact or experience.

The Commission in Luckenbach Steamship Co. vs. Southern Railway Co. Et Al., 157 I.C.C. 752, said, among other things, (p. 760):

"Complainant, acting as a free lance in the transportation world, refuses to place itself in a position wherein its rates and charges might become subject to regulation by this Commission, and yet seeks to invoke our aid in assisting it to divert from carriers subject to the Act, and whose rates and charges are subject to regulation by us, certain traffic which the rail carriers now enjoy, on the plea that the situation, competitive or otherwise, does not justify the conduct of the rail carriers here complained of whose lines are used to complete the transportation of traffic brought into the ports by the complainant's boat lines and destined to points beyond via rail. * * *"

213 Much of what is here said applies to the American Barge Line Company. If there ever was a free lance in the transportation world the experience of the carriers in the Mississippi Valley shows that the American Barge Line Company is one. It objects to any regulation of its port-to-port rates. It in effect laughs at the 20 percent differential basis, and makes whatever rates and differentials it chooses. Then with an about face it asks the Commission to aid it in a continuation of its practices, practices that are abhorrent to every word and line of the Interstate Commerce Act. The American Barge Line Company does not deserve the aid of the Commission with respect to the prayer of its petitions. The law does not under the circumstances require the granting of that aid or a compliance with the prayer of these petitions. The rail carriers, having been permitted, following the hearing before the Commission, to reduce the rates on cotton in order to meet the competition of the American Barge Line Company and other unregulated agencies of transportation, and to give the all-rail routes an equally of opportunity with the water routes, ought not now reasonably to be required to establish differential rates with the American Barge Line Company that are based on the very rates which the practices

of the American Barge Line Company helped to create. In any event the Commission should not consider the establishment of through routes and joint rates as requested in the petitions of
214 the American Barge Line Company, until there has been a hearing with respect to these petitions and all parties in interest have had an opportunity of being heard.

Respectfully submitted.

W. A. McGEHEE,
W. A. NORTHCUTT,
M. G. ROBERTS,
ELMER A. SMITH,
Attorneys for Respondents.
#135 East Eleventh Place, Chicago, Illinois.

NOVEMBER 14, 1932.

215 [Plaintiff's exhibit "E" omitted. See exhibit "A", printed side page, 5 ante.]

219 *Plaintiff's exhibit "F"*

Interstate Commerce Commission, Washington

I, George B. McGinty, secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of petition of southwestern rail carriers for postponement of effective date of orders, filed January 9, 1933, in ex parte no. 102, application of American Barge Line Company, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 12th day of January A.D. 1933.

[SEAL.]

(Sgd.) GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

220 Before the Interstate Commerce Commission. Ex Parte No. 102. Application of American Barge Line Company

Petition of southwestern rail carriers for postponement of effective date of orders.

R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, E. A. Smith, C. S. Burg, M. G. Roberts, B. F. Batts, J. L. Stewart, Robt. Thompson, H. H. Larimore, Geo. W. Holmes, Attorneys for Southwestern Carriers, 2008 Mo. Pac. Bldg., St. Louis, Missouri.

January 7, 1933.

221 Before the Interstate Commerce Commission. Ex Parte No. 102. Application of American Barge Line Company

Petition of southwestern rail carriers for postponement of effective date of orders.

Come now the southwestern carriers by railroad and show that they have filed with the Commission their certain petition dated December 30, 1932, praying vacation of orders of Commission of date December 10, 1932, entered in the above-entitled proceeding, together with reopening, consideration by the entire Commission, hearing, and dismissal of petitions, which said petition is before the Commission undisposed of. Said southwestern lines also show to the Commission that said orders of December 10, 1932, entered in the above-entitled proceeding, are effective February 6, 1933, on ten days' notice to the Commission and to the public.

In view of the foregoing, the Commission may not be able to give full consideration to the petition of such southwestern
222 lines heretofore referred to and filed with the Commission praying vacation of orders of December 10, 1932, together with reopening, consideration of the proceeding by the entire Commission, including a hearing, and followed by a dismissal of the petitions upon which said orders are based.

Petitioners, therefore, request that the effective date of the orders of the Commission entered December 10, 1932, be further postponed to April 6, 1933.

Respectfully submitted.

R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, E. A. Smith, C. S. Burg, M. G. Roberts, B. F. Batts, J. L. Stewart, Robt. Thompson, H. H. Larimore, Geo. W. Holmes, Attorneys for Southwestern Carriers.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each party.

Dated at St. Louis, Mo., this 7th day of January 1933.

H. H. LARIMORE.

2008 Mo. Pac. Bldg., St. Louis, Mo.
January 7, 1933.

223 *Plaintiff's Exhibit "G"*

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of petition of southwestern rail carriers for vacation of order, reopening, consideration by the entire Commission, hearing, and dismissal of petitions, filed January 9, 1933, in Ex Parte No. 102, Application of American Barge Line Company, the original of which is now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 12th day of January, A.D. 1933.

[SEAL.] (Sgd.) GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.

224 Before the Interstate Commerce Commission. Ex Parte No. 102. Application of American Barge Line Company

Petition of southwestern rail carriers for vacation of order, reopening, consideration by the entire commission, hearing, and dismissal of petitions.

R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, C. S. Burg, M. G. Roberts, B. F. Batts, J. L. Stewart, Robt. Thompson, H. H. Larimore, Geo. W. Holmes, Attorneys for Southwestern Carriers, 2008 Mo. Pac. Bldg., St. Louis, Missouri.

December 30, 1932.

225 Before the Interstate Commerce Commission. Ex Parte No. 102. Application of American Barge Line Company

Petition of southwestern rail carriers for vacation of order, reopening, consideration by the entire Commission, hearing, and dismissals of petition.

Come now The Atchison, Topeka and Santa Fe Railway Company, The Chicago, Rock Island and Pacific Railway Company, The Kansas City Southern Railway Company, Louisiana & Arkansas Railway Company, St. Louis-San Francisco Railway Company, J. M. Kurn and John G. Lonsdale, receivers of railroads and properties of St. Louis-San Francisco Railway Company, St. Louis Southwestern Railway Company, Texas and New Orleans Railroad Company, The Texas and Pacific Railway Company, and Missouri Pacific Railroad Company, hereinafter referred to as Southwestern carriers, for themselves and other common carriers by railroad similarly sit-
226 uated, and show that Division 4 of the Interstate Commerce Commission on December 10, 1932, filed the second supplemental report of the Commission in this proceeding and entered the following order:

Order

At a session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D.C., on the 10th day of December, A.D. 1932. Ex Parte No. 102. Application of American Barge Line Company

Upon further consideration of the matters and things involved in the above-entitled proceeding

It is ordered, That the second ordering paragraph of the order of March 11, 1932, in said proceeding be, and it is hereby, amended to read as follows:

It is further ordered, That, except as provided in the next succeeding paragraph hereof, said common carriers by rail, parties to the through routes prescribed in the next preceding paragraph hereof, be, and they are hereby, directed and required to join with

said American Barge Line Company in establishing, on or before September 19, 1932, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint rates applicable over said through routes, constructed by deducting from the lowest all-rail rate contemporaneously applicable on corresponding traffic over any route between the same points of origin and destination the following differentials: (a) Where over barge-rail routes the shortest all-rail distance via the lines of the connecting rail carriers from point of origin to point of destination through the port of interchange does not exceed the shortest rail distance between such points of origin and destination by more than 20 percent, where over barge-rail routes the shortest all-rail distance between the inland point of origin or destination and the port of interchange does not exceed two thirds of the shortest all-rail distance, where over rail-barge-rail routes the shortest all-rail distance from point of origin to point of destination through the port of interchange does not exceed by more than 20 percent the shortest rail distance between such points of origin and destination, and where over rail-barge-rail routes the total rail haul is not more than one half of the shortest all-rail distance between points of origin and destination, 20 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by said American Barge Line Company; and (b) in all other cases, 10 percent of the lowest corresponding all-rail rate between the ports between which the shipment is transported by said American Barge Line Company; Provided, however, That no such joint commodity rate need be established where the corresponding all-rail rate over the direct route from or to an interior point to or from a port of destination or origin involves at intermediate points departures from the long-and-short-haul provision of the fourth section of the Interstate Commerce Act, nor if said American Barge Line Company and the interested rail carriers agree that no such joint commodity rate shall be established; and Provided, further, That no joint barge-rail or rail-barge-rail rate established under this order from or to any given point of origin or destination need be lower than the corresponding all-rail rate between such point of origin or destination and the port of interchange.

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228 It is further ordered, That said order be, and it is hereby, further amended by inserting the following paragraph between the second and third ordering paragraphs thereof:

It is further ordered, That said common carriers by rail, parties to the through routes hereinbefore prescribed, be, and they are hereby, directed and required to join with said American Barge Line Company in establishing on or before January 25, 1933, upon notice to this commission and to the general public by not less than 15 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, joint rates on cotton in carloads, minimum

37,500 pounds, over barge-rail routes hereinbefore prescribed from Memphis, Tenn., to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, constructed by deducting from the corresponding all-rail rate the differential of 6 cents per 100 pounds, and rail-barge-rail rates from points Arkansas to the same destinations over rail-barge-rail routes hereinbefore prescribed, subject to the minimum weights shown below and constructed by deducting from the corresponding all-rail rates the following differentials: 8 cents, minimum 25,000–40,000 pounds; 6 cents, minimum 35,000–55,000 pounds; 4 cents, minimum 50,000–80,000 pounds.

And it is further ordered, That in all other respects said order, as amended, shall continue in effect until the further order of the Commission.

By the commission, division 4.

[SEAL] GEORGE B. MCGINTY,
Secretary.

229 In such supplemental report and order the Commission prescribed barge-rail and rail-barge-rail rates on cotton, in carloads, from certain points in Arkansas and Memphis, Tennessee, to eastern territory and New England, which said rates were prescribed in response to petitions filed with the Commission by the American Barge Line Company, and in which rates these petitioners are required to participate.

Your petitioners show that by petition dated November 12, 1932, and filed with the Commission on November 14, 1932, they requested a hearing upon said petitions filed by the American Barge Line Company and prayed the Commission to set down such petitions for hearing, to the end that your petitioners might appear at such hearing, offer testimony, and controvert the alleged facts set up by the American Barge Line Company in its said petitions.

The Commission, however, did not set down such petitions of the American Barge Line Company for hearing, and did not afford these petitioners a hearing or opportunity for hearing as to such petitions.

By reason of the fact that these petitioners were deprived of a hearing in connection with said petitions of American Barge Line Company, the second supplemental report of the Commission
230 and the orders entered in connection therewith of date December 10, 1932, and filed and entered in this proceeding, are unlawful and beyond the power, authority, and the jurisdiction of the Commission to make.

Petitioners, therefore, pray that the second supplemental report of the Commission entered in this proceeding and all orders entered in this proceeding of date December 10, 1932, be vacated and set aside; that this proceeding be reopened, considered, and determined by the entire Interstate Commerce Commission; that in connection with such consideration and determination of all matters and things connected with this proceeding by the entire Commission, a full and com-

plete hearing, after reasonable notice, be afforded your petitioners and all carriers by rail in anywise involved herein; that petitioners and all carriers by rail interested in this proceeding be permitted to appear before the Commission and offer testimony in opposition to the granting of the said petitions of American Barge Line Company herein referred to, and that such petitions of the American Barge Line Company be dismissed.

In support of this petition these petitioners refer to their petition of date November 12, 1932, and hereinbefore filed with the Commission, and ask that such petition be considered the same as if it
231 were fully incorporated herein.

Respectfully submitted.

R. S. Outlaw, A. B. Enoch, Wm. E. Davis, A. L. Burford, C. S. Burg, M. G. Roberts, B. F. Batts, J. L. Stewart, Robt. Thompson, H. H. Larimore, Geo. W. Holmes, Attorneys for Southwestern Carriers.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each party.

Dated at St. Louis, Mo., this 6th day of January 1933.

H. H. LARIMORE.

2008 Mo. Pac. Bldg., St. Louis, Mo.
December 30, 1932.

232–233 [Plaintiff's exhibit "H" omitted. See exhibit "C", printed side page, 24 ante.]

234 [Plaintiff's exhibit "I" omitted. See exhibit "B", printed side page, 23 ante.]

235–236 [Plaintiff's exhibit "J" omitted. See exhibit "A", printed side page, 22 ante.]

237 [Omitted in printing.]

238 In United States District Court

[Title omitted.]

Stipulation as to hearing

Filed April 14, 1933

It is stipulated and agreed by and between counsel for the respective parties that the hearing on plaintiffs' motion for preliminary injunction shall be considered by the court as a final hearing on the merits, that no further evidence shall be taken or introduced by either the plaintiffs, the original defendants, or any intervening defendant,

and that a final decree shall be entered by the court on the pleadings and record now before the court.

(Sgd.) E. Ennalls Berl, (Sgd.) H. H. Larimore, (Sgd.) R. S. Outlaw; Solicitors for Plaintiffs; (Sgd.) Elmer B. Collins, Special Assistant to the Attorney General, of Counsel for United States of America, defendant; (Sgd.) H. L. Underwood, Of counsel for Interstate Commerce Commission, defendant; (Sgd.) John J. Esch, (Sgd.) A. K. Shipe, Of counsel for American Barge Line Company, Mississippi Valley Barge Line, and Mississippi Valley Association, intervening defendants; (Sgd.) Clark C. Wren, Of counsel for Inland Waterways Corporation, intervening defendant.

[File indorsement omitted.]

239 In United States District Court for the District of Delaware

In equity no. 1012

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Before THOMPSON, Circuit Judge, and DICKINSON and NIELDS, district Judges

Findings of fact, conclusions of law, and opinion

Filed June 14, 1933

THOMPSON, Circuit Judge.

Findings of fact

1. Plaintiffs herein are common carriers by railroad subject to the Interstate Commerce Act, and engage in the transportation of cotton from points of origin in the State of Arkansas and from Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut.

2. On August 29, 1932, plaintiffs and other railroad carriers, because of severe competition from unregulated truck and water carriers, established carload rates upon cotton from points of origin in the State of Arkansas and from Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, upon a basis substantially and materially lower than the any-quantity rates theretofore
240 prevailing, and on November 16, 1932, plaintiffs and other railroad carriers further reduced said carload rates in the belief

that such further reduction was necessary to meet the competition above referred to.

3. By petitions dated October 31, 1932, and November 5, 1932, the American Barge Line Company applied to the Commission to enter an order requiring the railroads participating in the said carload cotton rates to participate with it in joint through rail-barge-rail and barge-rail carload rates from the same origins to the same destinations upon a basis lower than the all-rail carload rates. The natural and normal effect of such participation in through routes and rates with the American Barge Line Company would be to divert cotton, in carloads, from the all-rail routes previously established to the lower rail-barge-rail and barge-rail routes.

4. By petitions dated November 12, 1932, and November 14, 1932, the carriers operating both east and west of the Mississippi River, including plaintiffs in this action, prayed the Commission to set down for hearing the said applications of the American Barge Line Company, and represented to the Commission in their said petitions that without a full and fair hearing, after reasonable notice, at which hearing carriers by railroad, including plaintiffs, shippers, and other parties in interest, and representatives of the American Barge Line Company, should be permitted to appear and offer testimony and examine and cross-examine witnesses offered by all parties in any respect interested therein, the Commission could not properly and justly determine the issues presented by such applications. The carriers by railroad further averred specifically that without such hearing the Commission would be without proper evidence to determine—

241 a. Whether carriers by railroad, including certain of these plaintiffs, should be required to join with the American Barge Line Company in establishing through rail-barge-rail rates and through barge-rail rates on cotton, in carloads, from Arkansas and Memphis, Tennessee, to the destination territory heretofore described;

b. Whether such through rail-barge-rail rate and barge-rail rates, or either of them, should be lower or the same as the through all-rail rates then in effect;

c. What through routes, if any, should be required;

d. What rail-barge-rail routes and barge-rail routes, if any, should be established; and

e. What differential, if any, should be maintained for the water-rail routes under the all-rail routes.

5. In neither the petitions of the American Barge Line Company, dated October 31, 1932, and November 5, 1932, nor in the petitions or replies of the carriers dated November 12, 1932, and November 14, 1932, are there set forth any facts or evidence necessary to a determination by the Commission of the issues presented by the applications of the American Barge Line Company. The petitions of the American Barge Line Company substantially set forth solely the ultimate conclusion that the establishment of rail and water rates there requested was desirable and in the public interest, and the peti-

tions or replies of the carriers set forth in substance only a denial of such ultimate conclusion and a prayer for a hearing.

6. The Interstate Commerce Commission declined to grant to the railroad carriers a hearing as prayed in their petitions of November 12, 1932, and November 14, 1932, and without such hearing, on December 10, 1932, entered its said second supplemental report and order in Ex Parte 102, Application of American Barge Line
242 Company, in which plaintiffs and certain other carriers by railroad named therein were required to join with the American Barge Line Company in establishing, on or before January 25, 1933, upon fifteen days' notice, joint rail-barge-rail rates on cotton, in carloads, from the origin territory to the destination territory above described, upon a basis 8, 6, and 4 cents lower than the all-rail rates between the same points, dependent upon the application of varying minimum weights.

7. The said second supplemental order of the Commission was made without evidence to support it, and there is no record before the Commission which may be examined by a court if called upon to determine the legality or validity of the Commission's order.

8. By petitions dated December 30, 1932, and January 7, 1933, the southwestern carriers by railroad, plaintiffs herein, on their own behalf and on behalf of other carriers by railroad similarly situated, requested the Commission to vacate and set aside the said second supplemental order of December 10, 1932; to grant a reconsideration of all matters by the entire Commission; in connection with such reconsideration to afford said railroads a hearing prior to the effective date of any order; and to extend the effective date of said second supplemental order of December 10, 1932, in order to afford the Commission an opportunity to pass upon said petitions. The said petitions above referred to were denied by the Commission in its order of January 18, 1933.

9. By appropriate orders of the Commission the said second supplemental order of the Commission of December 10, 1932, has been extended to become effective June 1, 1933, upon ten days' notice to the public.

243 10. The said second supplemental order of the Commission will require the railroads serving the origin and destination territories involved to participate in joint through rail-barge-rail and barge-rail rates from points of origin in Arkansas and Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, upon a basis 4, 6, and 8 cents lower than the corresponding all-rail rates between the same points, and to observe such rail-barge-rail and barge-rail rates so constructed as a maximum rate as long as plaintiffs maintain all-rail carload rates on cotton between the same points of origin and destination heretofore referred to.

11. The said second supplemental order of the Commission of date December 10, 1932, if made effective, will require carriers by railroad whose lines serve the State of Arkansas to participate in

joint rail-barge-rail rates on cotton, in carloads, from Arkansas to the destination territory heretofore described, substantially lower than contemporaneously in effect via the all-rail routes in which such carriers now participate. In addition, such order will require carriers by railroad whose lines extend from Arkansas points to the St. Louis gateway to deliver cotton to the barge line at Memphis, Tennessee, for transportation by water to Pittsburgh, Pennsylvania, in many instances short-hauling such carriers and depriving them of the full use of their lines of railroad.

12. Such carriers would, in the event the cotton is delivered to the barge line at Memphis, Tennessee, receive less revenue than if such cotton were transported over all-rail routes to the St. Louis gateway and there delivered to eastern rail connections.

13. Carriers by railroad, plaintiffs in this action, who operate lines of railroad extending from the St. Louis gateway to the destination territory heretofore described, would, as to cotton moving rail-barge-rail, if the order of the Commission referred to becomes effective, take such cotton at Pittsburgh, Pennsylvania, instead of St. Louis, and would thereby be deprived of the use of their lines of railroad extending from the St. Louis gateway to Pittsburgh, Pennsylvania, and would receive less revenue than such carriers would receive if they enjoyed an all-rail haul from the St. Louis gateway to the destination territory involved under the all-rail rates now in effect.

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14. Carriers by railroad serving Memphis, Tennessee, with lines of railroad located west of Pittsburgh, as to cotton moving barge-rail, would be deprived of participation in the transportation of cotton, in carloads, moving from points in Arkansas and from Memphis, Tennessee, to the destination territory before set out. Lines of railroad operated by carriers extending eastward from Pittsburgh, Pennsylvania, to the destination territory involved, would be required to participate in rail-barge-rail rates from points in Arkansas, and barge-rail rates from Memphis, Tennessee, lower than now in effect via all-rail routes in which such carriers participate.

15. If the said second supplemental order of the Commission becomes effective, plaintiffs will be unable to recoup in any manner any losses which they will sustain thereby and the damage done them will therefore be irreparable.

CONCLUSIONS OF LAW

1. The statute here involved, Section 3 (e) of the Inland Waterways Corporation Act, as amended, U.S. Code, Tit. 49, c. 5, Section 153 (e), properly construed, requires the establishment by the Interstate Commerce Commission of through routes, joint rates, and differentials without a hearing in advance and the order of the Commission here attacked was made in pursuance of the express terms of the statute and not in disregard thereof.

245

2. Section 3 (e) of the Inland Waterways Corporation Act, as amended, vests in the Interstate Commerce Commission the power to require carriers by rail to participate in rail and water routes without opportunity to be heard before the entry of such an order or the effective date thereof to determine—

a. Whether carriers by railroad, including certain of these plaintiffs, should be required to join with the American Barge Line Company in establishing through rail-barge-rail rates and through barge-rail rates on cotton, in carloads, from Arkansas and Memphis, Tennessee, to the destination territory heretofore described;

b. Whether such through rail-barge-rail rates and barge-rail rates, or either of them, should be lower or the same as the through all-rail rates then in effect;

c. What through routes, if any, should be required;

d. What rail-barge-rail routes and barge-rail routes, if any, should be established; and

e. What differential, if any, should be maintained for the water-rail routes under the all-rail routes.

3. The second supplemental order of the Commission is void because made without evidence to support it.

4. The second supplemental order of the Commission is an affirmative and final order of the Interstate Commerce Commission which plaintiffs must comply with by a certain date or incur the penalties provided for by statute, and is such an order as may be reviewed by the courts pursuant to Section 41, paragraph 28, and Sections 43, 44, 45, 46, and 47 of title 28, United States Code Annotated.

246 5. Section 3 (e) of the Inland Waterways Corporation Act, as amended, authorizes the entry of an order and compliance therewith without hearing, denies the parties the right to the judicial review of such order referred to in paragraph 4 hereof, and is arbitrary and unreasonable and therefore in violation of the Fifth Amendment to the Constitution of the United States.

6. Section 3 (e) authorizes the Commission to establish joint rail and water rates without hearing or evidence, and constitutes a delegation of pure legislative power contrary to the provisions of article I, sec. 1, of the Constitution.

7. The constitutional right of plaintiffs to a full and fair hearing before the entry of an order against them and compliance therewith, is not complied with by provision for any subsequent hearing.

8. The constitutional right of plaintiffs to a full and fair hearing before the entry of an order against them and compliance therewith, is not affected by the fact that the Commission in some subsequent proceeding may change or alter its former order after hearing. If plaintiffs be required to comply with any such order for any period whatsoever without prior hearing their constitutional rights are invaded, and due process of law is denied them.

9. The action of the Commission in denying plaintiffs' petitions for a hearing, and in requiring the joint rail and water rates to

become effective without such hearing, denied to the carriers a hearing or opportunity to be heard and constitute a denial of due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

247 OPINION

This suit was brought under the provisions of the District Court Jurisdiction Act, 38 Stat. 219 (28 U.S.C.A., sec. 41, subd. 28), to set aside an order of the Interstate Commerce Commission and, pending final decree, to secure a preliminary injunction. The plaintiffs are common carriers by rail. The American Barge Line Company is a common carrier by water, and operates barges on the Ohio and Mississippi Rivers between Pittsburgh and New Orleans. The Barge Company had on several occasions sought and obtained from the Commission, in accordance with the provisions of the amended Inland Waterways Corporation Act (49 U.S.C.A., sup. 153 e), certificates of public convenience and necessity which authorized it to operate on the named rivers. The Commission ordered the plaintiff railroad carriers to establish through barge-rail rates and they complied with those orders. At the time of the entry of the orders, the railroads were operating under normal rates. Subsequently the plaintiffs and other carriers by railroad established so-called carload rates upon cotton from points in Arkansas and Memphis, Tennessee, to points in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut. Those rates were lower than the any-quantity rates on cotton then prevailing and were designed to assist the railroads to meet competition from unregulated truck and water carriers. Following the establishment of these depressed rates, the Barge Company petitioned the Commission to order the railroad carriers to establish through rail-barge-rail rates on cotton in carload lots for the territory already described. The railroad carriers petitioned the Commission for a hearing on the application of the Barge Company. This hearing was denied.

248 The Commission entered its second supplemental report and order in which it directed the plaintiffs to participate with the Barge Company in joint through rail-barge-rail and barge-rail rates on cotton in carloads, in the named territory, upon a basis of 8, 6, and 4 cents lower than the all-rail rates between the same points. The plaintiffs' petitions requesting the Commission to vacate and set aside this second supplemental order and to grant them a hearing, were denied. The effective date of the order has been extended to June 1, 1933. All parties have agreed by stipulation filed that the court may enter a final decree on the pleadings and record now before it.

The question in controversy is whether the Commission was in error in refusing a hearing upon the plaintiffs' petition prior to entering the second supplemental order. The plaintiffs argue that the Commission misconstrued the wording and the intent of the

amended Inland Waterways Corporation Act, supra. They further contend that, if the Commission was justified in its interpretation of the act, the act is unconstitutional in that it deprives the plaintiffs of property without due process of law in contravention of the Fifth Amendment to the Constitution, and constitutes a delegation of legislative power in violation of the provisions of Article I, sec. 1, of the Constitution.

Section 3 (e) (49 U.S.C.A., supp. 153 e) of the act is as follows:

"Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of this title, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of this title, and the Commission shall, in such
249 order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the Commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the Commission or by agreement of the water carriers and the other participating carriers. The Commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the Commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The Commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the Commission; or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the Commission under the provisions of this section; and after full hearings the Commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the Commission shall give the hearing and decision of such questions preference over

all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: * * *."

The language of the act is unambiguous. There is no requirement that a hearing be had prior to the order establishing through routes and joint rates. The provision for a hearing appears later in that portion of the section wherein the Commission is given authority to enter upon a hearing concerning the reasonableness or lawfulness of any through route or joint rate already filed in obedience to its order. Soon after the passage of the amendment to the Inland Waterways Corporation Act, the Commission secured the views of interested parties with respect to the meaning and purpose of the section in dispute and with respect to the procedure which
250 it should follow, particularly with reference to the extent to which public hearings are required. The Commission concluded, at that time, that a hearing was not provided for nor required prior to the issuance of orders directing or prescribing through routes and joint rates. Its analysis of the provisions of the section is reported in Procedure under Barge Line Act, 148 I.C.C. 129.

A study of the situation which preceded the enactment of the Inland Waterways Corporation Act and of the amendment thereto discloses that Congress intended to foster transportation by water wherever possible. In House Report No. 1537, House of Rep., 71st Cong., 1st sess., appears the following statement:

"This policy of opposition on the part of many of the railroads has resulted in years of delay in the extension of the benefits of water transportation to interior communities and has seriously retarded the successful operation of the Inland Waterways Corporation. Unless such opposition on the part of the rail carriers is overcome and through routes, joint rates, and an equitable division of joint rates is made available without interminable delays and the heavy expenses necessary to carry on such proceedings before the Interstate Commerce Commission, privately owned transportation service will never be realized on the inland waterways of the country.

"The hearings on this bill convinced the committee that legislation somewhat drastic is now not only needed but is necessary in order to fully carry out the purposes for creating the Inland Waterways Corporation, and to realize the benefits of the policy of Congress manifested by the large expenditures made for the improvement of our inland waterways.

"Paragraph (e) of the bill was carefully prepared to accomplish this purpose. If enacted into law, it is believed by the committee that it will immediately result in overcoming the reluctance of many of the railroads to cooperate with the Inland Waterways Corporation, and will aid in bringing about such through routes, joint rates, and fair division of joint rates as will afford to the people of a large part of the country the economies of cheaper transportation by water.

"This paragraph of the bill authorizes the Commission to direct connecting common carriers to join with the water carriers in through routes and joint rates, and to fix reasonable minimum differentials between all rail rates and joint rail and water rates; and it further authorizes the Commission to require the rail and water carrier
251 to enter into negotiations for the purpose of establishing equitable divisions of joint rates within 30 days after such joint rates are established. If they fail to so agree upon equitable divisions within 120 days, the Commission shall itself determine and establish reasonable divisions of such rates. Provision is made for any carrier who feels aggrieved by such action of the Commission to make complaint and have a full hearing under short proceedings, and the Commission is authorized to give the hearing and decision of such question preference over all other questions pending before it, except such questions as are given like preference by law. All carriers are thus given their day in court."

Since it is our view that the Commission did not misconstrue the act nor exceed the powers the Congress intended to confer upon it, the question is whether the act, so construed, is constitutional.

The second supplemental order, of which complaint is made, was unquestionably and admittedly made by the Commission without according the plaintiffs an opportunity to submit evidence or examine and cross-examine witnesses. Many authorities may be cited holding that an order establishing rates without hearing the public-service corporations affected thereby violates the guarantee of the Fifth Amendment of the Constitution. Cases cited by the plaintiffs, such as Interstate Commerce Commission v. Louisville & Nashville Railroad Co., 227 U.S. 88; New York & Queens Gas Co. v. McCall, 245 U.S. 345; and Manufacturers Railway Co. v. United States, 246 U.S. 457, although they involve statutes which provide for a public hearing, sustain the general principle that in the exercise of the rate-making power by administrative bodies, a hearing must be accorded the parties affected in order to afford due process of law. The same constitutional question, from a somewhat different viewpoint, is raised by the plaintiffs when they assert that, since the Commission made the order complained of without legal evidence to support it, the order is necessarily void. See United States v. Abilene &
252 Southern Railway Co., 265 U.S. 274. The necessity for a hearing when the Commission exercises its rate-making power over public-service corporations is pointed out by Mr. Justice Cardozo in Norwegian Nitrogen Products v. United States, decided February 6, 1933. In Atchison, Topeka & Santa Fe Railway Co. v. United States, 284 U.S. 248, it was held that a fair hearing is a fundamental requirement in the discharge by the Commission of its duty of determining reasonable rates.

We are forced to the conclusion that the attempted delegation by Congress of its power to establish rates without a public hearing is unconsttutional. The Supreme Court in Hampton & Co. v. United States, 276 U.S. 394, said:

"Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a commission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down, that rates shall be just and reasonable considering the service given, and not discriminatory. As said by this Court in Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 214, 'The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress.'"

While it is well settled that Congress may delegate to the Interstate Commerce Commission, as an administrative tribunal, the power to fix rates, provided they are just and reasonable, that result can be lawfully accomplished by the Commission only after a fair and full hearing of the carriers affected.

A final decree may be entered in accordance with this opinion, and a permanent injunction issued setting aside, annulling, and suspending the order of the Commission.

253 In United States District Court

[Title omitted.]

Concurring opinion

Filed June 14, 1933

NIELDS, D. J., concurring.

I concur in the result reached by Judge Thompson that section 3 (e) of the amendment to the Inland Waterways Corporation Act, known as the Denison Act, violates the fifth amendment to the Constitution of the United States and, consequently, that the second supplemental order of the Interstate Commerce Commission, here complained of, is void.

In my opinion, the deprivation of property that plaintiffs will suffer is not "short hauling" over their all-rail routes. That loss might well be the result of wholesome water competition. But the second supplemental order of the Commission directs the plaintiffs to participate with the American Barge Line Company in
254 joint through rail-barge-rail and barge-rail rates on cotton

in carloads upon a basis of 8, 6, and 4 cents lower than the all-rail rates between designated points. This is nothing less than rate-making in which plaintiffs are forcibly required to participate. The order is directed against plaintiffs "limiting their powers in the transaction of their business" and is a deprivation of property within the fifth amendment. Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 318.

The due process or hearing guaranteed by that amendment is not afforded in the Dennison Act and cannot be imported into the text of the act. It is true that the Commission may only "fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service" * * * and may only establish "equitable divisions" of the joint differential rates. If it were sought to imply a hearing before order from this language, the implication is negatived by the express provision of the act for a hearing of complaints after order filed.

The hearing by the Commission after the filing of its order is a hearing after deprivation of property and is not the hearing guaranteed by the Constitution. It may well be where the administration of the taxing power has been delegated to a commission public necessity requires that due process be afforded after the imposition or even after the payment of the tax. Hagar v. Reclamation District No. 108, 111 U.S. 701. Standard Oil Co. of California v. McLaughlin, 55 F. (2d) 274, 277. No such public exigency exists where, as here, the purpose of the act is "to promote, en-
255 courage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." 49 U.S.C.A. § 142; 41 Stat. 499.

256 In United States District Court

[Title omitted.]

Dissenting opinion

Filed June 14, 1933

DICKINSON, D. J., dissenting.

Except for one underlying thought, we would be able to follow the majority opinion to its conclusion. No being in accord with this underlying thought, we must dissent.

The thought is that railroad carriers have a property right in the prospective traffic which might or would (except for some complained of act of another) pass by their lines. This is the same claim of property right which the ox-team and pack-horse asserted against steam transportation, the stage coach against the trolley, and which now in turn the railroads are asserting against the

257 gas engine, motor truck, and bus. It may be that all of them will in the near future combine in the attempt to enforce such a right against air carriers.

It is unnecessary to inquire into the validity of such a claim of right because the complainants have expressly disclaimed it and the majority opinion does not avow it. It seems to us, however, that it underlies the ruling made because this is based upon the unconstitutionality of the act of Congress, under authority of which the Commission acted in making the order, the enforcement of which is enjoined, and the unconstitutionality consists in that the order deprives the complainants of property without due process, &c. The logic of the situation is that if they have a property right they should have protection, but if they have no property right they have no legal or equitable right of complaint. The property interest of a carrier in compensation for the carriage of traffic committed to it is undoubted. Whether it has a like property right in prospective traffic is another question. The sole question here is the existence of the latter right.

An outline and very general statement of the fact situation, it seems to us, makes this clear. There is a traffic between the Atlantic and Pacific coasts. There are established railroad line carriers which have been taking care of this traffic and will, if permitted, continue to do so. This traffic, or a part of it, may be visualized as carried by existing railroads from the Pacific coast to the Mississippi River where the Ohio empties into it. If we then think of the 258 traffic as transported northwardly by one line of railroad to its junction with the Pennsylvania Railroad and over it eastwardly through Pittsburgh to the Atlantic coast, we have a sufficiently general idea of the pre-order situation. The Ohio River extends from its junction with the Mississippi northeastwardly to and beyond Pittsburgh and is navigable at least to Pittsburgh. If we think of the line of the first railroad we have mentioned and of the Pennsylvania Railroad as forming the legs of a right-angle triangle, the Ohio River would be the hypothenuse. A barge line water route has been established on the Ohio River. Anyone can foresee that if the all-rail route from coast to coast traffic is diverted to a rail-and-water route to Pittsburgh and a rail route to the Atlantic, the railroad first mentioned may lose all of this through traffic and the Pennsylvania that part of it formerly carried by the first-mentioned railroad except only as the Pennsylvania would continue to carry it east from Pittsburgh.

The situation of the railroads mentioned is typical of all and shows the real nature of the damnum of which complaint is made and that it relates to what we have called prospective traffic. The damnum is unquestioned and is not merely speculative but actual. The sole question is whether there is likewise an injuria. If, as before stated, the complainants have a property right in this prospective traffic which they will lose they have suffered not merely a loss but a legal injury.

Inasmuch, however, as it is conceded that no such right
259 exists, we are unable to see how the decree in question can deprive the complainants of property which has no existence. If we were dealing with a statute which gave the right to a hearing before a preliminary order could be made, we would concede that the question of a property right did not arise. The statute, however, is, and we think correctly, construed to permit of the order without a hearing, and thus the sole question is its constitutionality and its constitutionality turns upon the question of a deprivation of property without compensation or otherwise without due process. The existence of the property right thus becomes pivotal.

We think the bill should be dismissed.

[File endorsement omitted.]

260 In United States District Court

In Equity No. 1012

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Final decree

Filed June 26, 1933

Before the Honorable J. Whitaker Thompson, United States circuit judge, Honorable Oliver B. Dickinson, United States district judge, and Honorable John P. Nields, United States district judge, sitting pursuant to provisions of an act of Congress known as Urgent Deficiencies Act (38 Stat. L. 220) approved October 22, 1913.

This cause came on for hearing on motion of plaintiffs for a temporary injunction, on the 28th day of February, 1933, when came and appeared plaintiffs by their solicitors, the defendant, United States of America, and the defendant, Interstate Commerce Commission, by their solicitors, and Inland Waterways Corporation, American Barge Line Company, Mississippi Valley Barge Line Company, and Mississippi Valley Association, interveners, by their solicitors, and it appearing that said defendants and interveners had filed their answers herein, this cause was taken up and considered by the court upon the evidence submitted by plaintiffs, defendants, and interveners, and after oral argument before the court the cause was briefed by counsel for plaintiffs, defendants, and interveners.

Thereafter, by stipulation filed in this court on the 14th day of April, 1933, and signed by solicitors for plaintiffs, defend-
261 ants, and interveners, it was agreed that the hearing on plaintiffs' motion for a temporary injunction should be considered by the court as a final hearing on the merits; that no further evidence should be taken or introduced by either the plaintiffs, the

defendants, or interveners, and that a final decree should be entered by the court on the pleadings and record then before the court.

Upon consideration whereof the court being fully advised in the premises, and having filed in this cause its findings of fact and conclusions of law, do find in accordance with its written opinion filed in said cause on the 14th day of June, 1933, that the plaintiffs are entitled to the relief prayed for in their bill of complaint.

It is therefore accordingly ordered, adjudged, and decreed by the court:

1. That the order of the Interstate Commerce Commission entered the 10th day of December, 1932, in cause Ex Parte No. 102, Application of American Barge Line Company, a copy of which is attached to the bill of complaint as Exhibit No. "A", be, and the same is hereby, set aside and annulled;

2. That the United States of America and the Interstate Commerce Commission, and each of them, their officers and agents, be and they are perpetually enjoined from enforcing or attempting to enforce said order of the Interstate Commerce Commission or any of the terms or parts thereof.

June 26, 1933.

By the court:

(Sgd.) J. WHITAKER THOMPSON,
United States Circuit Judge.
(Sgd.) O. B. DICKINSON,
United States District Judge.
(Sgd.) JOHN P. NIELDS,
United States District Judge.

262 Approved (as to form):
(Sgd.) E. ENNALLS BERL,
(Sgd.) ELMER A. SMITH,
(Sgd.) R. S. OUTLAW,
(Sgd.) H. H. LARIMORE,
Solicitors for plaintiffs.
(Sgd.) ELMER B. COLLINS,
Special Assistant to the Attorney General,
Counsel for United States of America, defendant.
(Sgd.) H. L. UNDERWOOD,
Of counsel for Interstate Commerce Commission, defendant.
(Sgd.) A. K. SHIPE,
(Sgd.) JOHN J. ESCH,
Of counsel for American Barge Line Company, Mississippi Valley Barge Line Company, and Mississippi Valley Association, intervening defendants.
(Sgd.) CLARK C. WREN,
Of counsel for Inland Waterways Corporation, intervening defendant.

[File endorsement omitted.]

263 In United States District Court

[Title omitted.]

Petition for appeal

Filed Aug. 9, 1933

The United States of America and Interstate Commerce Commission, defendants, and American Barge Line Company, Inland Waterways Corporation, Mississippi Valley Barge Line Company, and The Mississippi Valley Association, intervening defendants, in the above-entitled cause, feeling themselves aggrieved by the final decree of the District Court of the United States for the District of Delaware, entered in said court June 26, 1933, pray an appeal from said decree to the Supreme Court of the United States.

The particulars wherein they consider the decree erroneous are set forth in the assignment of errors, accompanying this petition and to which reference is hereby made.

Said defendants pray that a transcript of record, proceedings, and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated August 9, 1933.

(Sgd.) ELMER B. COLLINS,
Solicitor for the United States of America.
(Sgd.) H. L. UNDERWOOD,
Solicitor for Interstate Commerce Commission.
(Sgd.) CLARK C. WREN,
Solicitor for Inland Waterways Corporation.
(Sgd.) JOHN J. ESCH,
(Sgd.) A. K. SHIPE,
Solicitors for American Barge Line Company, Mississippi Valley Barge Line Company, The Mississippi Valley Association.

264 [File endorsement omitted.]

265 In the United States District Court

[Title omitted.]

Assignment of errors

Filed Aug. 9, 1933

Now come the United States of America and Interstate Commerce Commission, defendants, and Inland Waterways Corporation, American Barge Line Company, Mississippi Valley Barge Line Company,

and The Mississippi Valley Association, intervening defendants, by their respective counsel, and in connection with their appeal, file the following assignment of errors upon which they will rely in the prosecution of their appeal to the Supreme Court of the United States from the final decree of this court entered June 26, 1933.

The District Court erred:

1. In holding and deciding that section 3 (e) of the Inland Waterways Corporation Act, as amended, U.S. Code, title 49, c. 5, section 153 (e), in authorizing the Interstate Commerce Commission to establish joint rail and water rates without hearing or evidence, constitutes a delegation of pure legislative authority contrary to the provisions of article I, section 1, of the Constitution of the United States.

266 2. In holding and deciding that section 3 (e) of the Inland Waterways Corporation Act, as amended, in authorizing the entry of an order and compliance therewith, without hearing, denies the parties the right to a judicial review of such order and that such action is arbitrary and unreasonable and in violation of the fifth amendment to the Constitution of the United States.

3. In holding and deciding that the constitutional right of plaintiffs to a full and fair hearing is not complied with by the provision in said section 3 (e) for a subsequent hearing upon the filing of a complaint as provided for and specified in said section.

4. In holding and deciding that the action of the Interstate Commerce Commission in denying plaintiffs' petitions for a hearing and in requiring joint rail and water rates to be established without such a hearing or opportunity to be heard constituted a denial of due process of law, in violation of the fifth amendment to the Constitution of the United States.

5. In not holding and deciding that the provisions of section 3 (e) of the Inland Waterways Corporation Act was a valid and constitutional exercise of the power of Congress.

6. In not holding and deciding that the provision in said section 3 (e), requiring the Interstate Commerce Commission to proceed to a hearing upon the filing of a complaint by an aggrieved carrier, satisfied the due process clause of the fifth amendment.

7. In not holding and deciding that the plaintiffs had failed to exhaust their administrative remedies and that such failure barred the granting of the relief which they sought by their bill.

267 8. In not holding and deciding that no legal rights of the plaintiffs are affected or threatened by the said order of the Interstate Commerce Commission.

9. In not holding and deciding that plaintiffs failed to allege and prove that any legal injury resulted or would result from the order of the Commission.

10. In entering a decree setting aside the order of the Interstate Commerce Commission and enjoining the enforcement of said order.

11. In not dismissing the bill of complaint.

Dated August 9, 1933.

(Sgd.) ELMER B. COLLINS,
Solicitor for United States of America.
(Sgd.) H. L. UNDERWOOD,
Solicitor for Interstate Commerce Commission.
(Sgd.) CLARK C. WREN,
Solicitor for Inland Waterways Corporation.
(Sgd.) JOHN J. ESCH,
(Sgd.) A. K. SHIPE,
Solicitors for American Barge Line Company, Mississippi Valley Barge Line Company, The Mississippi Valley Association.

[File endorsement omitted.]

268 In United States District Court

[Title omitted.]

Order allowing appeal

Filed Aug. 9, 1933

In the above-entitled cause the United States of America, Interstate Commerce Commission, defendants, and Inland Waterways Corporation, American Barge Line Company, Mississippi Valley Barge Line Company, and The Mississippi Valley Association, intervening defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final decree of this court in this cause entered June 26, 1933, and having also made and filed an assignment of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of court in such case made and provided, it is

Ordered and decreed that the appeal be, and the same is hereby, allowed as prayed for.

(Sgd.) JOHN P. NIELDS,
United States District Judge.

Dated August 9, 1933.

[File endorsement omitted.]

269 In United States District Court

[Title omitted.]

Notice to attorney general of the State of Delaware

Filed Aug. 16, 1933

To Honorable PERCY WARREN GREEN,
Attorney General of the State of Delaware:

Pursuant to Urgent Deficiencies Act of October 22, 1913, 38 Stat. 221, you are hereby notified that the defendants, United States of

America and Interstate Commerce Commission, and the intervening defendants, Inland Waterways Corporation, American Barge Line Company, Mississippi Barge Line Company and The Mississippi Valley Association, have taken an appeal to the Supreme Court of the United States from the final decree of the United States District Court, entered June 26, 1933, and the order allowing the appeal makes the same returnable within forty days from the date hereof.

(Sgd.) ELMER B. COLLINS,
Solicitor for the United States.
(Sgd.) H. L. UNDERWOOD,
Solicitor for Interstate Commerce Commission.
(Sgd.) CLARK C. WREN,
Solicitor for Inland Waterways Corporation.

270

(Sgd.) JOHN J. ESCH,
(Sgd.) A. K. SHIPE,
Solicitors for American Barge Line Company, Mississippi Valley Barge Line Company, The Mississippi Valley Association.

Service of a copy of the foregoing notice is hereby acknowledged this 16th day of August 1933.

(Sgd.) PERCY WARREN GREEN,
Attorney General, State of Delaware.

271 [Citation in usual form showing service on E. Ennalls Berl, filed Aug. 9, 1933, omitted in printing.]

272 [Omitted.]

273 In United States District Court

[Title omitted.]

Pracipe for transcript of record

Filed Aug. 9, 1933

To the CLERK:

Please prepare a transcript of the record in the above-entitled cause for the purposes of the appeal herein filed and allowed, including therein the following papers and proceedings, to wit:

1. Bill of complaint and exhibit A thereto attached.
2. Answer of United States of America.
3. Answer of Interstate Commerce Commission and exhibits A, B, and C thereto attached.
4. Petition of Inland Waterways Corporation for leave to intervene and order allowing intervention.
5. Answer of Inland Waterways Corporation.
6. Petition of American Barge Line Company for leave to intervene and order allowing intervention.

7. Answer of American Barge Line Company.*
8. Petition of Mississippi Valley Barge Line Company for leave to intervene and order allowing intervention.
9. Answer of Mississippi Valley Barge Line Company.*
10. Petition of The Mississippi Valley Association for
274 leave to intervene and order allowing intervention.
11. Answer of The Mississippi Valley Association.*
12. Affidavits of J. R. Staley, O. M. Meyne, J. P. Patterson, S. C. Matthews, and Robert D. Reeves, submitted by plaintiffs.
13. Affidavits of George A. Casey and T. Q. Ashburn, submitted by defendants.
14. Plaintiffs' exhibits A, B, C, D, E, F, G, H, I, and J.
15. Stipulation that cause may be taken as submitted on final hearing.
16. Opinion of District Court.
17. Concurring opinion of District Judge Nields.
18. Dissenting opinion of District Judge Dickinson.
19. Findings of fact and conclusions of law of District Court.
20. Final decree.
21. Petition for appeal.
22. Assignment of errors.
23. Order allowing appeal.
24. Notice to Attorney General of the State of Delaware.
25. Citation on appeal.
26. Statement of jurisdiction of Supreme Court, together with notice and acknowledgment of service.
27. Præcipe for record.

(Sgd.) John J. Esch, (sgd.) A. K. Shipe, Solicitors for American Barge Line Company, Mississippi Valley Barge Line Company, the Mississippi Valley Association; (sgd.) Elmer B. Collins, Solicitor for United States of America; (sgd.) H. L. Underwood, Solicitor for Interstate Commerce Commission; (sgd.) Clark C. Wren, Solicitor for Inland Waterways Corporation.

275 Service of a copy of the above præcipe for transcript of record is hereby acknowledged this 9th day of August 1933.

(Sgd.) E. ENNALLS BERL,
Solicitor for Plaintiffs-Appellees.

[File endorsement omitted.]

276 [Clerk's certificate to foregoing transcript omitted in printing.]

277 In Supreme Court of the United States

Statement of points to be relied upon and designation of the record to be printed

Filed Sept. 5, 1933

Come now the appellants and say that they will rely on the following points in brief and oral argument before this court on their appeal in the above-entitled cause:

1. The construction given section 3 (e) of the Inland Waterways Corporation Act by the Interstate Commerce Commission was correct and consonant with the purpose and intent of Congress in the enactment of that section.

2. The Commission in this case followed the procedure ordained by the statute, and its action was in all respects in full accord with the statute.

3. The statute as construed and applied by the Commission is within the competency of Congress and violates no constitutional provision or guaranty.

4. The district court erred in deciding that the statute was unconstitutional.

5. The plaintiffs (appellees) have no standing to attack the validity or constitutionality of the statute, since they did not
278 and have not availed themselves of the opportunity for a hearing which the statute provides, and thus have failed to exhaust their administrative remedies.

6. No legal rights of the plaintiffs (appellees) are threatened or affected by the order of the Interstate Commerce Commission challenged in this case; plaintiffs have failed to allege or prove that any such injury resulted or would result from that order. Hence they have no basis for their bill of complaint.

Appellants further state that the entire record in this cause as filed in this court is necessary for consideration of the points set forth above.

J. CRAWFORD BIGGS,
Solicitor General.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
H. L. UNDERWOOD,
Solicitor for Interstate Commerce Commission.
CLARK C. WREN,
Solicitor for Inland Waterways Corporation.
JOHN J. ESCH,
A. K. SHIPE,
Solicitors for American Barge Line Company, Mississippi Barge Line Company, The Mississippi Valley Association.

Service of a copy of the above statement of points to be relied upon and designation of the record to be printed is hereby acknowledged this ——— day of ————, 1933.

———— ————,
Solicitor for appellees.

279 [File endorsement omitted.]

U.S. GOVERNMENT PRINTING OFFICE: 1933

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 422

UNITED STATES OF AMERICA ET AL., APPELLANTS

v.

ILLINOIS CENTRAL RAILROAD COMPANY ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

STATEMENT AS TO JURISDICTION ON APPEAL

In compliance with Rule 12 of the Rules of the Supreme Court, appellants submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the above-entitled case on appeal.

STATUTES

Section 5 of the Commerce Court Act (c. 309, 36 Stat. 539; U.S.C. Sup. VI, Tit. 28, Sec. 45a).

Section 238 of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938, par. (4); U.S.C., Tit. 28, Sec. 345).

Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; U.S.C., Tit. 28, Secs. 45 and 47a, Sup. VI).

DECREE

The decree sought to be reviewed was entered June 26, 1933.

The petition for appeal was filed and the order allowing the appeal was entered August 9, 1933.

THE NATURE OF THE CASE AND RULINGS BELOW

This suit was brought by 31 railroads to enjoin, set aside, and annul an order of the Interstate Commerce Commission, made and entered December 10, 1931, in a proceeding entitled Ex Parte No. 102, *Application of American Barge Line Company,* 190 I.C.C. 177.

This proceeding before the Commission was initiated by the American Barge Line Company to secure an order, pursuant to the provisions of Section 3 (e) of the Inland Waterways Corporation Act, as amended May 29, 1928, by the so-called Denison Act (U.S.C. Sup. VI, Tit. 49, c. 5, Sec. 153 (e)), requiring certain common carriers by railroad, including the appellees herein, to join with the Barge Line Company in establishing joint rates on cotton over through routes previously established from certain Arkansas points and Memphis, Tennessee, to eastern territory and southern New England.

Upon consideration of this application and of representations and protests against establishment of the rates sought and request for hearings, the Commission made and issued its order as aforesaid.

By bill of complaint filed February 2, 1933, the appellees asserted that the construction placed upon the so-called Denison Act by the Commission; that is, that orders my be made thereunder without affording a hearing upon the necessity and advisability of establishing through routes and joint rates in connection with barge lines, was erroneous; but that, if correct, then the Act was unconstitutional, being violative of the Fifth Amendment in taking their property without due process of law and, further, that it also constituted an unlawful delegation of power to the Commission contrary to Article I of the Constitution.

Hearing was had before a statutory court of three judges. Findings of fact and conclusions of law were made and opinions rendered, the majority holding the Act to be unconstitutional and the Commission's order therefore invalid. A final decree was entered permanently annulling, enjoining, and setting aside the Commission's order.

CASES SUSTAINING JURISDICTION

United States v. *Erie Railroad Co.*, 280 U.S. 98.

United States v. *Baltimore & Ohio R.R. Co.*, 284 U.S. 195.

I.C.C. v. *Oregon-Washington R. Co.*, 288 U.S. 14.

United States v. *Northern Pacific Ry.*, 288 U.S. 490.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

ELMER B. COLLINS,
Solicitor for the United States.

H. L. UNDERWOOD,
Solicitor for Interstate Commerce Commission.

CLARK C. WREN,
Solicitor for Inland Waterways Corporation.

JOHN J. ESCH;
A. K. SHIPE,
Solicitors for American Barge Line Company, Mississippi Valley Barge Line Company, The Mississippi Valley Association.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 1022

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellants,

v.

ILLINOIS CENTRAL RAILROAD, ET AL.,
Appellees.

BRIEF FOR APPELLANTS, AMERICAN BARGE LINE COMPANY, MISSISSIPPI VALLEY BARGE LINE COMPANY, AND THE MISSISSIPPI VALLEY ASSOCIATION.

A. E. Stevens,
736 Transportation Building,
Washington, D. C.,
Attorney for the American Barge Line Company, Mississippi Valley Barge Line Company, and The Mississippi Valley Association.

Of counsel:
Eaton, Lewis, Woolard, Taylor & Shaw,
736 Transportation Building,
Washington, D. C.

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Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 422.

THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellants,
v.
ILLINOIS CENTRAL RAILROAD, ET AL.,
Appellees.

BRIEF FOR APPELLANTS, AMERICAN BARGE LINE COMPANY, MISSISSIPPI VALLEY BARGE LINE COMPANY, AND THE MISSISSIPPI VALLEY ASSOCIATION.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

OPINION BELOW.

The opinions below are found in the Record at Pages 117–129.

JURISDICTION.

Jurisdiction of this Court was noted October 3, 1933.

STATEMENT OF FACTS.

The appellees brought suit in the Court below to enjoin, annul and set aside an order of the Interstate Commerce Commission issued December 10, 1932, pursuant to the provisions

of the Inland Waterways Corporation Act, as amended (43 Stat. L. 360, amended 45 Stat. L. 978; U. S. C. Title 49, Sections 151, 153).

The order of the Commission was issued on application of the American Barge Line Company, 190 I. C. C. 177.

Both the report upon which the Commission bases its determination and the order are printed in the record at pages 17 and 24, respectively.

By the order the appellees were required to file and publish joint through rail and water rates in conjunction with the American Barge Line, operating on the Mississippi and Ohio Rivers between Memphis, Tennessee, and Pittsburgh, Pennsylvania.

The Inland Waterways Act, as amended in 1928, Section 3 (e), sets forth the procedure to be followed by the applicant desirous of operating an interstate commerce water carrier business in conjunction with interstate commerce carriers by rail. First, the applicant must apply for a certificate of public convenience and necessity; and when that is granted the Act provides that the Interstate Commerce Commission "shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, * * * " and, "shall, in such order, fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service to apply until changed by order of the Commission."

The Act then proceeds to give authority to the Commission

> "Upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the Commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the Commission under the provisions of this Act; and after full hearings the Commission may make such order

with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the Commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible."

Pursuant to the Act, the appellee, the American Barge Line Company, on March 20, 1931, applied for a certificate of public convenience and necessity to operate a barge line service on the Mississippi and Ohio Rivers between New Orleans, Louisiana, and Pittsburgh, Pennsylvania, and for establishment of through barge-rail and rail-barge-rail rates in conjunction with its water service at certain points therein named.

The hearing on the application was confined to the question whether the applicant was entitled to a certificate of public convenience and necessity to operate a waterways business. Data were presented in support of the application by the Barge Line. Neither the interested state authorities, who had been notified of the application, nor competing barge lines opposed the granting of the certificate. Rail carriers in official and Southwestern territories interposed objections at the hearing and also filed briefs in opposition to the granting of the certificate.

After hearing, the Commission, on March 11, 1932, granted the certificate. In compliance with the mandate of the Inland Waterways Corporation Act, the Commission, thereupon, prescribed through routes and joint rates between the barge line and rail carriers on certain classes of traffic and commodities between points in the territory designated in its report and order. 182 I. C. C. 521.

The Commission fixed differentials of 20% and 10% under the lowest all-rail rate contemporaneously applicable on corresponding traffic between the same points of origin and

destination. The differentials were based upon a percentage of the barge-rail route or the rail-barge-rail route over the shortest all-rail distance. 182 I. C. C. 529, 530.

In May, 1932, the American Barge Line Company petitioned for additional through routes and joint rates between certain Ohio River ports and certain points in the Southwest, via Memphis and New Orleans. The Commission, by order dated June 14, 1932, granted the petitioners' request, with the same conditions and limitations as contained in the original report and order, *supra*. 185 I. C. C. 483.

In November, 1932, the American Barge Line Company petitioned the Commission, in two applications, for supplemental orders directing the establishment of rail-barge-rail rates from all points in Arkansas, and barge-rail rates on cotton from Memphis, Tennessee, to all points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, via the barge line between Memphis, Tennessee, and Pittsburgh, Pennsylvania, based on differentials under carload rail rates.

The applicable rail rates had been put into effect on September 1, 1932, and were lower than the rail rates in effect on the dates of the prior orders of the Commission. These lower rates had been established by the railroads because of alleged competition of truck and water carriers, and were limited to July 31, 1933.

The railroads further reduced rates in the applicable territory in November, 1932, giving as a reason therefor that the rates established on September 1, 1932, were not low enough to accomplish the desired purpose.

The railroads connecting with the barge line refused to join with it in rates based upon a differential on the low rates which had thus been established by the railroads and were then effective. Then followed the application by the American Barge Line Company requesting the Commission to enter an order requiring the rail carriers to join with the water carrier in such joint rates and through routes.

The application by the American Barge Line was filed with the Commission in November, 1932, and the Commission

issued its report and order on December 10, 1932, amending its order of March 11, 1932, and required the affected rail carriers to join with the American Barge Line Company in establishing joint rates constructed as therein provided. The order provided:

> "*It is further ordered*, That said order be and it is hereby, further amended by inserting the following paragraph between the second and third ordering paragraphs thereof:
>
> "*It is further ordered*, That said common carriers by rail, partes to the through routes hereinbefore prescribed, be, and they are hereby, directed and required to join with said American Barge Line Company in establishing on or before January 25, 1933, upon notice to this Commission and to the general public by not less than fifteen days filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, joint rates on cotton in carloads, minimum 37,500 pounds, over barge-rail routes hereinbefore prescribed from Memphis, Tennessee, to points in Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, constructed by deducting from the corresponding all-rail rate the differential of 6 cents per hundred pounds and rail-barge-rail rates from points in Arkansas to the same destinations over rail-barge-rail routes hereinbefore prescribed, subject to the minimum weights shown below and constructed by deducting from the corresponding all-rail rates the following differentials: 8 cents, minimum 25,000–40,000 pounds; 6 cents, minimum 35,000–55,000 pounds; 4 cents, minimum 50,000–80,000 pounds,
>
> "*And it is further ordered*, That in all other respects said order, as amended, shall continue in effect until the further order of the Commission."

No hearing was held before the Commission on the application upon which the order, a part of which is above quoted, dated December 10, 1932, was issued. When it passed upon the question of holding a hearing the Commission said:

> "In response to the considerable number of requests that these petitions be assigned for hearing, it should be pointed out that in *Procedure Under Barge Line Act*, 148 I. C. C. 129, after instituting a proceeding to ascertain the views of

interested parties with respect to the meaning and purpose of the Denison Act before undertaking its administration, we came to the conclusion that that Act does not authorize hearings as to the differential rates referred to therein, being 'an attempt to substitute for hearings prior to our orders establishing through routes and joint rates, fixing minimum differentials, and prescribing equitable divisions, subsequent hearings upon complaint.' The reasons for that conclusion were very fully stated in that report, are quite as applicable here, and need not be repeated. No petitions for reconsideration were thereafter filed. We further pointed out that the Act made provision for possible changes in level in the following sentence contained therein: 'Such joint routes, rates, rules, regulations, and practices may be changed by order of the Commission or by agreement of the water carriers and other participating carriers.'

"There is no provision for hearings in connection with such modifying orders, and to hold prior hearings would be inconsistent with the plain intent of the Act. In the past we have entered such orders without hearing on several occasions when the need therefor was brought to our attention. In the prior orders in this proceeding we prescribed rates on cotton applicable on shipments in any quantity corresponding to the application of the rail rates. We are now called on to change those rates insofar as they apply on carload shipments of certain minimum weights in the light of changes which have been made in the rail rates. The facts upon which we rely in this report are verified by the tariffs in our files and by information obtained in connection with other proceedings. 190 I. C. C. 179, 180."

The effective date of the establishment of the fixed rates has been extended several times by the Commission.

On January 9, 1933, the Southwestern carriers petitioned the Commission for "vacation of order, reopening, consideration by the entire Commission, hearing and dismissal of the petitions," of the American Barge Line. This petition of the carriers was denied by the Commission on January 18, 1933. In denying the petition the Commission in its order said:

"*Provided*, That the action herein is without prejudice to respondents' right to a summary hearing concerning

the reasonableness of the through routes, joint rates, and minimum differentials prescribed in the order of March 11, 1932, in said proceeding, as amended by said order of December 10, 1932, upon complaint filed as authorized by the Inland Waterways Corporation Act."

No such complaint was filed by the affected parties.

On February 2, 1933, the appellees filed a suit in the United States District Court for Delaware seeking a decree setting aside and annulling the order of the Commission dated December 10, 1932, on the ground that it was beyond the lawful power of the Commission and wholly void.

After oral argument, and briefs filed, the Court below, consisting of three judges, in its majority opinion filed June 14, 1933, authorized a final decree, and a permanent injunction setting aside, annulling and suspending the order of the said Commission upon the ground that:

> "The attempted delegation by the Congress of its power to establish rates without a public hearing is unconstitutional," and, "while it is well settled that Congress may delegate to the Interstate Commerce Commission, an administrative tribunal, the power to fix rates, provided they are just and reasonable, that result can be lawfully accomplished by the Commission only after a fair and full hearing of the carriers affected. Record 125, 126."

From that opinion an appeal was taken to this Court, and an order allowing the appeal was filed by the Court below August 9, 1933. Record page 133.

Jurisdiction was noted by this Court on October 9, 1933.

SPECIFICATIONS OF THE ASSIGNED ERRORS OF THE COURT BELOW INTENDED TO BE URGED.

The Court below erred:

(1) In deciding that Section 3 (e) of the Inland Waterways Corporation Act, as amended, U. S. Code Title 49, Chap. 5, Section 153 (e) in authorizing the Interstate Commerce Commission to establish joint rail and water rates without hearing or evidence, constitutes a delegation of pure legislative author-

ity contrary to the provisions of Article 1, Section 1 of the Constitution of the United States;

(2) In deciding that Section 3 (e) of the Inland Waterways Corporation Act, as amended, in authorizing the entry of an order and compliance therewith, without hearing, denies the parties the right to a judicial review of such order and that such action is arbitrary and unreasonable and in violation of the Fifth Amendment of the Constitution of the United States;

(3) In deciding that the constitutional right of plaintiffs below to a full and fair hearing is not complied with by the provision in Section 3 (e) of the said Act, for a subsequent hearing upon the filing of a complaint as provided for and specified in said section;

(4) In deciding that the action of the Interstate Commerce Commission in denying petitions of plaintiffs below for a hearing and in requiring joint rail and water rates to be established without such a hearing or opportunity to be heard constituted a denial of due process of law, in violation of the Fifth Amendment of the Constitution of the United States;

(5) In not deciding that the provision of Section 3 (e) of the Inland Waterways Corporation Act was a valid and constitutional exercise of the power of Congress;

(6) In not deciding that the provision in said Section 3 (e) requiring the Interstate Commerce Commission to proceed to a hearing upon the filing of a complaint by an aggrieved carrier satisfied the due process clause of the fifth Amendment of the Constitution of the United States;

(7) In not deciding that the plaintiffs below had failed to exhaust their administrative remedies and that such failure barred the granting of the relief which they sought by their bill;

(8) In not deciding that no legal rights of the plaintiffs below are affected or threatened by the said order of the Interstate Commerce Commission;

(9) In not deciding that plaintiffs below failed to allege and prove that any legal injury resulted or would result from the order of the Commission;

(10) In entering a decree setting aside the order of the Interstate Commerce Commission and enjoining the enforcement of said order;

(11) In not dismissing the bill of complaint.

THE STATUTES INVOLVED.

The provisions of the pertinent statutes necessary in determining the issues here involved are: Inland Waterways Corporation Act, as amended by the Act of May 29, 1928, Chap. 243, 43 Stat. 360; 45 Stat. 978, Chap. 891, p. 978, Section 3 (e) 1 U. S. Code, Supplement 3, Title 49, Chap. 5, Section 153 (e). Sec. 500, Transportation Act, 1920.

QUESTIONS PRESENTED.

(1) Whether the Interstate Commerce Commission has the legal authority and power under the provisions of Section 3 (e) of the Inland Waterways Corporation Act upon application to require carriers by rail to join with water carriers in joint rates and through routes.

(2) Whether a hearing must be accorded prior to the issuance of an order directing such joint rates and through routes.

(3) Whether a hearing is a sufficient guaranty against any invasion of the constitutional rights of the affected parties if it is afforded by the Interstate Commerce Commission subsequent to its order and upon complaint of any affected party, as provided in Section 3 (e) of the Act of Congress here in question.

(4) Whether any legal rights of the appellees have been invaded by the Commission's orders.

(5) Whether the appellees have alleged or proven a property right, which, by order of the Commission, might have been taken away from them in contravention of the due process clause of the Federal Constitution.

(6) Whether the appellees exhausted their remedy before the Interstate Commerce Commission prior to instituting their suit in the Court below.

ARGUMENT.

1.

THE INTERSTATE COMMERCE COMMISMISSION WAS LEGALLY AUTHORIZED AND EMPOWERED UNDER THE PROVISIONS OF SECTION 3 (e) OF THE INLAND WATERWAYS CORPORATION ACT TO ENTER THE ORDER OF DECEMBER 10, 1932; AND THE HEARING PROVIDED IN THE ACT IS A SUFFICIENT GUARANTY AGAINST ANY INVASION OF THE CONSTITUTIONAL RIGHTS OF THE AFFECTED PARTIES.

In fixing rates the Interstate Commerce Commission acts as in a legislative capacity; and when it declares a specific rate to be a reasonable and lawful rate for the future it speaks as the legislature and its act has the same force as the statute. *Arizona Grocery Company* v. *Atchison Railway*, 284 U. S. 370, 386; *Terminal R. R. Association* v. *United States*, 266 U. S. 17, 30; *Louisville and Nashville Railway Company* v. *Garrett*, 231 U. S. 298, 318; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226.

The power to require joint rates and through routes is but the exercise of the broad powers given by the Constitution to

regulate commerce. *St. Louis S. W. Railroad Company* v. *U. S.*, 245 U. S. 136, 142, 144; *Manufacturers Railway Company* v. *U. S.*, 246 U. S. 457, 478.

Obviously, the order of the Commission dated December 10, 1932, was an act of the Commission under a mandate of the Congress and it spoke as the legislature. *Arizona Grocery Company* v. *Atchison, etc., Railway Company, supra.*

It is submitted that the Congress in the first instance could have taken the action which is set forth in the Commission's order of December 10, 1932. Instead it conferred that duty and power upon the Interstate Commerce Commission and in the exercise of that duty and power the Commission's act was that of a legislative character.

In the case of *Home Telephone Company* v. *Los Angeles*, 211 U. S. 265, the question was presented whether a hearing was essential to due process in rate making. On that question this Court held at page 278 of its opinion:

> "The appellant also contends that the ordinances fixing rates are wanting in due process of law, and therefore violate the Fourteenth Amendment of the Constitution of the United States, because the section (31) of the charter, under whose authority they were enacted, does not expressly provide for notice and hearing before action. But rate regulation is purely a legislative function and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings and, for peculiar reasons, in some forms of taxation (see *Londoner* v. *Denver*, 210 U. S. 373) would not seem to be indispensable."

In passing it is observed that Section 3 (e) of the Inland Waterways Corporation Act here in question provides for a hearing, at once, if there are complaining parties. The Section, in effect, provides for a summary proceeding and an expedited hearing and determination, all of which the appellees could have availed themselves of under the procedure hereafter set forth before the order of the Commission here in question actually became effective.

It is plain from the reading of the Act that the appellees

could well have filed a complaint with the Commission long before the effective date of the order of December 10, 1932. After filing such complaint they could have invoked the authority of the Commission under Section 15 (7) of the Interstate Commerce Act whereby the Commission may suspend any schedule of rates pending a hearing upon the lawfulness thereof. Rule of Practice 19 of the Commission provides for such suspension upon application in writing or by telegram.

Under the procedure thus established by the Congress under the Inland Waterways Corporation Act and the Interstate Commerce Commission Act, the order of December 10, 1932, only tentatively fixed the rights of the parties and any affected parties could either have accepted the order as finally establishing their rights, or they could have filed a complaint, and, after hearing, the Commission was authorized to make such order as it should find proper and in the public interest. It is difficult to ascertain from this procedure just how any property right of the Appellees could have been impaired, and, further, even assuming that under this procedure there might conceivably have resulted some impairment of a property right, the appellees were not denied the right under general principles of jurisprudence to a judicial review of the action of the Commission.

As stated in *Bradley* v. *Richmond*, 227 U. S. 477, at page 483:

> "If the right to appear and be heard and to obtain a review should prove illusory, there would, under general principles of jurisprudence, remain the right to judicial review, if the result should violate either a right secured under the law of the State or that of the United States. This is the right which plaintiff in error has in this very case asserted. Kentucky Railroad Tax Cases, 115 U. S. 321, 335, 336."

In the case of *Buttfield* v. *Stranahan*, 192 U. S. 470, this Court had before it the question of the constitutionality of an Act of Congress which prohibited the importation of tea which did not comply with standards fixed by the Secretary of the Treasury upon recommendation of a Board which he was

authorized to appoint. The importer was required, under the Act, to submit samples of the tea for examination and comparison with the standards thus fixed. If the finding of the Examiner was protested it was referred to a Board of three United States General Appraisers, whose decision was made final. The importer was advised that the tea did not comply with the fixed standards. He did not export it within the time required under the statute and it was destroyed. An action was brought against the Collector of the Port for damages for seizure, removal, and destruction of the tea.

The importer contended: (a) that the authority to establish standards was legislative, and could not be delegated by the Congress to administrative officers; (b) that the establishment and enforcement of standards which deprived the importer of an alleged vested right to import was a deprivation of a property right without due process of law; (c) that notice and opportunity to be heard by the importer was not afforded, and the Act was therefore unconstitutional; (d) that destruction of the tea without judicial determination was condemnation of property without a hearing, and a taking thereof without due process of law.

In disposing of the question and sustaining the validity of the Act this Court said at page 493 of the opinion:

> "As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution * * *.
>
> "It is urged that there was denial of due process of law in failing to accord plaintiff in error a hearing before the Board of Tea Inspectors and the Secretary of the Treasury in establishing the standard in question, and before the General Appraisers upon the reexamination of the tea.

Waiving the point that the plaintiff in error does not appear to have asked for a hearing, and assuming that the statute did not confer such a right, we are of opinion that the statute was not objectionable for that reason. The provisions in respect to the fixing of standards and the examination of samples by Government experts was for the purpose of determining whether the conditions existed which conferred the right to import, and they, therefore, in no just sense concerned a taking of property. This latter question was intended by Congress to be finally settled, not by a judicial proceeding, but by the action of the agents of the Government, upon whom power on the subject was conferred. * * *

"The importer was charged with notice of the provisions of the law, and the conditions upon which teas might be brought from abroad with a view of their introduction into the United States for consumption. Failing to establish the right to import, because of the inferior quality of the merchandise as compared with the standard, the duty was imposed upon the importer to perform certain requirements, and to take the goods from the custody of the authorities within a period of time fixed by the statute, which was ample in duration. He was notified of the happening of the various contingencies requiring positive action on his part. The duty to take such action was enjoined upon him, and if he failed to exercise it the Collector was under the obligation after the expiration of the time limit to destroy the goods. That plaintiff in error had knowledge of the various steps taken with respect to the tea, including the final rejection by the Board of General Appraisers, is conceded. We think the provision of the statute complained of was not wanting in due process of law."

In *Dayton-Goose Creek Railway* v. *United States*, 263 U. S. 456, this Court had before it the recapture provision of the Interstate Commerce Act, Section 15–A, incorporated in the Transportation Act 1920. In passing upon an objection to the Act upon the ground that no opportunity was afforded for a judicial hearing as to whether the return fixed was a fair one, the Court said:

"It is further objected that no opportunity is given under Section 15–A for a judicial hearing as to whether the

return fixed is a fair return. The steps prescribed in the Act constituted a direct and indirect legislative fixing of rates. No special provision need be made in the Act for the judicial consideration of its reasonableness on the issues of confiscation. Resort to the Courts for such an inquiry exists under Sections 208 and 211 of the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution. Ohio Valley Water Company *v.* Ben Avon Borough, 253 U. S. 287."

In *Chicago* v. *O'Connell*, 278 Ill. 591, 8 A. L. R. 916, the City of Chicago sought to enjoin the State Public Utilities Commission from enforcing its order relating to the equipment and operation of street cars in Chicago. Two street railway companies and the City of Chicago contended that the order amounted to taking of their property without due process of law, as it was the result of a proceeding to which they were not parties before the Commission. On the question the Court said, 8 A. L. R. 929, 930:

"Even though the two railway companies last mentioned and the City were not made parties to the proceedings before the Commission, they were not thereby deprived of a hearing before the Commission. Section 67 of the Public Utilities Act provides:

" 'After any rule, regulation, order or decision has been made by the Commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding and specified in the application for rehearing, and the Commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear.'

"The provision for a review of the decision of the Commission upon the rehearing is the same as the provision for review of the original order. None of the appellees have, therefore, been deprived of a hearing upon the reasonableness of the order made by the Commission, and have not been deprived of property without due process of law."

An appeal from the above decision was dismissed by this Court, 250 U. S. 651.

There is great similarity in the questions raised in that case and the questions raised by the appellees in the instant case.

Cases of similar import are *Bragg* v. *Weaver*, 251 U. S. 57; *North Laramie Land Company* v. *Hoffman*, 268 U. S. 276; *Chicago, etc., Ry.* v. *Minnesota*, 134 U. S. 418; *Louisville & Nashville Ry.* v. *Garrett*, 231 U. S. 298, 314, 315; *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651–660; *Missouri* v. *Chicago, etc., Ry.*, 241 U. S. 533; *Oklahoma Co.* v. *Love*, 252 U. S. 331; *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287.

In *St. Louis, S. W. Ry. Co.* v. *U. S.*, 245 U. S. 136, 142, this Court in passing upon the right of the Congress to delegate power to the Interstate Commerce Commission to enter an order for through routes and joint rates, said:

> "The complaining carriers having engaged in this particular commerce, it is clear that Congress has power to regulate it. Atlantic Coast Line R. R. Co. *v.* Riverside Mills, 219 U. S. 186. No reason appears why the regulation might not take the form of compelling the substitution of a joint rate for a through rate made by a combination of local rates or by a combination of a local rate with a joint rate to an intermediate point. Cincinnati, New Orleans & Texas Pacific Ry. Co. *v.* Interstate Commerce Commission, 162 U. S. 184."

And at pages 143 and 144 of the opinion:

> "That Congress has power to authorize the Commission to enter an order for through routes and joint rates, like that here complained of, has been heretofore assumed. No reason is shown for questioning its existence now. The provisions of the Act to Regulate Commerce as amended (1887, c. 104, Secs. 1, 12, 15, 24 Stat. 379; 1906, c. 3591, Sec. 4, 34 Stat. 584; 1910, c. 309, Sec. 12, 36 Stat. 539, 552) are also appropriate to confer this authority upon the Commission."

The Congress in the Inland Waterways Corporation Act clearly delegated to the Interstate Commerce Commission the

authority which that Commission exercised in entering its order of December 10, 1932, and such a delegation of authority is consistent with the long established policy of the Congress supported by a long line of decisions of this Court.

Further, Section 500 of the Transportation Act of 1920 expressly states the policy of the Congress to be "to promote, encourage and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." The intention of the legislature as set forth in Section 500 of the Transportation Act of 1920 is the law. 59 C. J. Sec. 568; *Edwards* v. *Morton*, 46 S. W. 792; *Cheney* v. *Cheney*, 85 A. 387; *Broward* v. *Broward*, 117 So. 691. This section has been before this Court in the case of *Chicago, R. I. and P. R. R. Co.* v. *United States*, 274 U. S. 36; *Tin Plate to Sacramento*, 140 I. C. C. 643.

The Commission, therefore, in entering its order of December 10, 1932, acted in direct compliance with the statutory expression of the Congress.

2.

THE APPELLEES HAVE NOT EXHAUSTED THEIR REMEDY BEFORE THE INTERSTATE COMMERCE COMMISSION.

Section 3 (e) of the Inland Waterways Corporation Act, as amended, clearly and without ambiguity, prescribes the action that shall be taken by the carriers regarding the establishment of through routes and differentially constructed rates between rail and water carriers. The Act gives to any carrier who is not satisfied with the order of the Commission the right to file a complaint and have an immediate hearing. That part of the Act has not been complied with by the appellees. Until they comply with that provision of the Act no one can tell whether any alleged right of theirs is invaded, or whether they may suffer any damage.

The Transportation Act of 1920 and the Inland Waterways

Corporation Act give a full, complete, and adequate legal remedy to the appellees. They must avail themselves of that remedy. It is elemental that a court of equity has no jurisdiction where there is a full, complete and adequate remedy at law. If the rail carriers were dissatisfied with the order of the Commission of December 10, 1932, they should have filed a complaint with the Commission, and if there was any doubt as to the expedited hearing on that complaint the carriers may have filed a request with the Commission for a suspension of the rates pending a hearing on the complaint. The Commission has, and often exercises, its lawful right to suspend the rates pending a hearing. Certainly it is not for the rail carriers to assert that the Commission would not suspend the rates pending a hearing when they have not made any attempt whatever to comply with the provisions of the Act in an effort to bring the legal machinery of the Commission into operation so as to protect and defend any alleged legal rights which they may now assert that they have.

Under the decisions of this Court it is well established that the Constitution guarantees a right to be heard before a final determination and judgment may be lawfully entered against those whose rights or properties will be affected or impaired thereby. Undoubtedly the rates prescribed by the Commission in its order here in question may not be enforced against the appellees, over their protest, without an adequate hearing some time between the beginning of the proceedings before the Commission and the actual enforcement of the rates. We submit, however, that the right to a hearing does not carry with it the right to any particular procedure or the right to a hearing at any particular time during the course of the proceeding. This Court laid down the rule in *Crane* v. *Hahlo*, 258 U. S. 142, 147 that:

> "No one has a vested right in any given mode of procedure (Railroad Co. *v.* Grant, 98 U. S. 398, 401; Gwin *v.* United States, 184 U. S. 669, 674) and so long as a substantial and efficient remedy remains or is provided, due process of law is not denied by a legislative change. Oshkosh Water Works Co. *v.* Oshkosh, 187 U. S. 437, 439."

The Inland Waterways Corporation Act provides for a hearing; it does not prevent a judicial determination of the correctness of the order of the Commission, and, therefore, adequately protects the appellees, should they follow the procedure set forth in the Act and in the Transportation Act of 1920.

We are aware of the decision of this Court in *Missouri-Pacific Railway* v. *Tucker*, 230 U. S. 340, wherein a part of its decision in *Ex Parte Young*, 209 U. S. 123, 147, was quoted in establishing the rule that:

> "If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this Court has held such a law to be unconstitutional. Chicago, etc. Railway Co. *v.* Minnesota, 134 U. S. 418."

To the same effect was the decision in the *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U. S. 287.

The latest expression on this question that we have been able to find is in *Porter* v. *Investor's Syndicate*, 286 U. S. 461. In this case the State of Montana had by statute set about to regulate the conduct of investment business within the state and had conferred jurisdiction of the adminstrative details of the law to a Commissioner which required a permit as a condition precedent to conducting investment business. The Commissioner had authority to cancel any such permit and thereby forfeiting the right to the permittee to continue business within the state.

The Investor's Syndicate had been licensed under the statute in question to do business. Its license was subsequently revoked by order of the Commissioner. The law provided that the right of review of all orders of the Commissioner was reserved to the Court. The Investor's Syndicate instead of invoking the remedy thus provided, brought suit in the Federal Court in Montana to enjoin enforcement of the Commissioner's order. The Federal statutory court in Montana, comprised of three judges, entered a decree granting the injunction. An appeal was taken to this Court from that decree.

In reversing the opinion of the lower court, this Court said:

> "We are of opinion that the appellee failed to exhaust its administrative remedy before applying to the district court for injunctive relief. The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code (supra) confers on any interested person dissatisfied with a finding or decision by the Commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order and set it aside as unjust or unreasonable, and directs that on the hearing the judge 'may set aside, modify or confirm said * * * decision as the evidence and the rules or (sic) equity may require.' The section confers the right to appeal to the state supreme court from the judgment of the trial court. Clearly the function of the state district court under the statutory mandate is not solely judicial, that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. * * * The legislative process remains incomplete until the action of that court shall have become final. * * * And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. * * * When the appellee was notified on June 22, 1931, that the rule adopted by the appellant would become effective July 22 of the same year an action could have been filed in the state court and a hearing had upon all questions of fact and law touching the propriety of the order."

We observe that these and other decisions reaffirm the rule of law that due process guarantees a hearing before some properly constituted tribunal, and at some time prior to the enforcement of the rates against the carriers. It is our firm belief that should the appellees have taken advantage of the procedure set forth in the Inland Waterways Corporation Act, they would have been amply protected against their claim of any invasion of their constitutional rights. They did not avail themselves of that procedure. They have not exhausted their remedy either before the Commission or before a judicial tribunal, which is not prohibited to them by the statutes.

They, therefore, have no standing in this Court prior to exhausting their remedy before the Commission as expressly provided in Section 3 (e) of the Inland Waterways Corporation Act.

3.

THE APPELLEES HAVE NOT ALLEGED OR ESTABLISHED A PROPERTY RIGHT WHICH BY ORDER OF THE COMMISSION WAS OR COULD BE TAKEN AWAY FROM THEM IN CONTRAVENTION OF THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

There is no inherent legal right in the appellees to transport freight over rail to the complete exclusion of other forms of transportation. The Congress has never recognized any such right, and there was no such property right at common law. Indeed the Transportation Act, 1920, negatives any such right by expressly providing that one form of transportation may invate the field of another by showing convenience and necessity for greater transportation service. *Pennsylvania Railroad Company v. United States*, 40 Fed. (2d) 921.

The appellees, and each of them, allege in their bill of complaint in paragraphs 4, Sections 1 and 2 thereof, that if the order of the Commission be made effective the appellees will sustain continuing damages and substantial losses of revenue, either because the cotton in transportation, in which it now participates, will be diverted to rail-barge-rail or barge-rail routes in which it can not participate, or in which it will be deprived of the full use of its railroad, or because it will be required to participate in the transportation of cotton at rates much lower than the all-rail rates in which it now participates; that the second supplemental report and order of the Commission, here attacked, establishes improper, unlawful and unreasonable through rail-barge-rail rates and through barge-rail rates; that the said rates are not fairly or reasonably related to all-rail rates on cotton in carload lots in effect at the time the order was entered, and that the minimum differentials

prescribed by the Commission, if made effective, would result in through rail-barge-rail rates and through barge-rail rates from and to the territory therein described; that they are inlawful and unreasonably low and would result in unlawfully diverting shipments of cotton from all-rail routes participated in by the appellees to the rail-barge-rail and barge-rail routes required to be established by the Commission's order; that it would result in continuing damage to the appellees because they would be deprived of revenue that would accrue to them because of the movement in cotton in carload lots from Arkansas and Memphis, Tennessee, to the destination territory described in the order in which the appellees participated over all-rail routes.

These allegations have been denied by the appellees. There is no relevant and material evidence in the record in support of the allegation with reference to the unreasonableness of the through routes and differentially constructed rates established by the Second Supplemental Report and the order. There is no evidence to support the claim of irreparable damage. There is no evidence showing that the ultimate amount that the rail carriers will receive for their proportionate movement of the cotton between the points designated by rail-barge-rail or barge-rail, will be less than the amount that they would receive by virtue of a division of the through all-rail route. The allegations in the bill of complaint having been denied and no proof in support of the allegations having been submitted, there was nothing upon which the court below could act in granting the relief prayed for.

Moreover, the divisions provided for in the Act may be negotiated by the carriers, and if they can not agree, the Commission may fix reasonable divisions. That authority, in the Act itself, negatives the allegation of the carriers that they will be required to participate in the transportation of cotton at rates much lower than the all-rail rates in which it now participates. In the absence of proof to the contrary the Commission will be presumed to establish and fix divisions that are reasonable, and it is bound to make the divisions retroactive to the effective date of the order.

The mere fact that the rail carriers may lose traffic is immaterial to the issue here. There is no legal right vested in

them to the transportation of cotton in commerce—it is a privilege to be enjoyed so long as it lasts, and is subject to the like privilege to be accorded other transportation facilities. These appellants have been lawfully empowered, by certificate of public convenience and necessity, to participate in interstate commerce on the waterways. They enjoy an equal privilege with rail carriers in the eye of the law. Neither rail nor water carriers have the legal right to the transportation of freight in interstate commerce to the exclusion of the other. The court below was without jurisdiction to issue an injunction where no property right was involved. In a case of this kind the due process clause of the Constitution can only be brought into operation when there is allegation and proof of the taking of property or property right without due process of law.

CONCLUSION.

We respectfully submit that Section 3 (e) of the Inland Waterways Corporation Act legally authorized and empowered the Commission to enter the order here in question; that the hearing provided in the Act is a sufficient guarantee against any invasion of the constitutional rights of the affected parties; that the appellees have not exhausted their remedy before the Interstate Commerce Commission; that they have failed to invoke the procedure as prescribed in the applicable statutes; that they have failed to allege or establish any property right which was, or could have been, taken away in contravention of the due process clause of the constitution; and, therefore, the opinion of the court below should be reversed.

Respectfully submitted,

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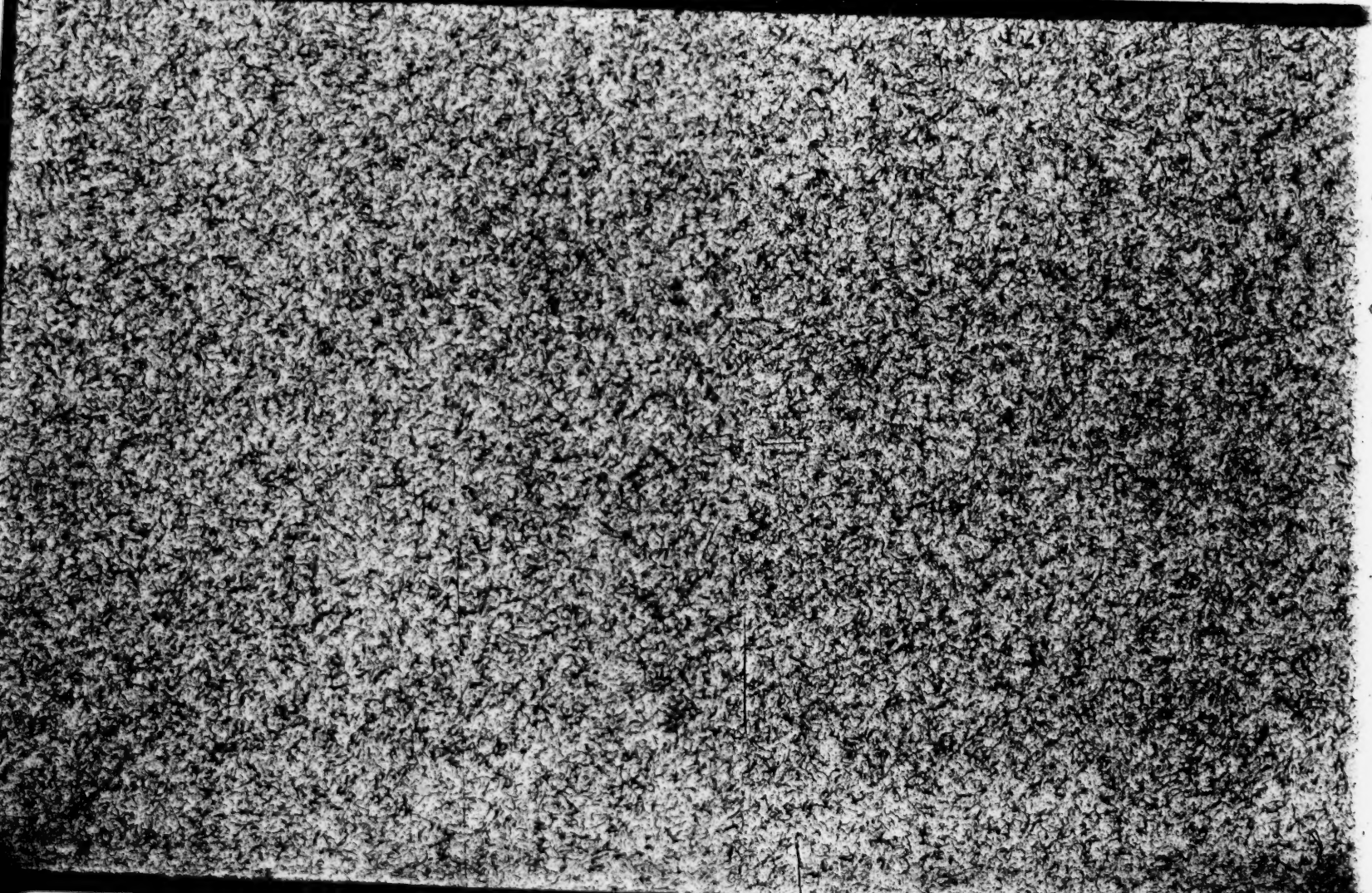

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 422.

UNITED STATES OF AMERICA, ET AL., *Appellants*,

vs.

ILLINOIS CENTRAL R. R. CO., ET AL., *Appellees*.

BRIEF FOR APPELLANT, INLAND WATERWAYS CORPORATION.

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OCTOBER TERM, 1933.

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UNITED STATES OF AMERICA, ET AL., *Appellants,*

vs.

ILLINOIS CENTRAL R. R. CO., ET AL., *Appellees.*

BRIEF FOR APPELLANT, INLAND WATERWAYS CORPORATION.

STATEMENT OF THE CASE.

The Statute under attack in this case (Sec. 3 (e), Barge Line Act, Copy attached as Appendix A) affords to Appellees an expedited full hearing by the Interstate Commerce Commission respecting the lawfulness and reasonableness of the Commission's orders under the Statute. The order of the Commission complained of (R. 22, 23) was issued December 10, 1932, and required action by Appellees "on or before January 25, 1933," which date was extended by the Commission to June 1, 1933 (R. 31), during all of which time the Appellees, to obtain a full hear-

ing thereon, had only to file the rates mandated by the order and then, within ten days and before they became effective, file complaint against them with the Commission. Upon the filing of such complaint the Commission was legally empowered to suspend the execution of such order pending the conclusion of the hearing (Interstate Commerce Act, Sec. 15 (7), U. S. C. Title 49, Copy attached as Appendix B). Appellees elected not to file any such complaint (R. 30) and presented their Bill in Equity to a Federal Court in Delaware asking that said order be declared void and that its enforcement be perpetually enjoined. The Bill named the United States of America and the Interstate Commerce Commission as defendants; and the American Barge Line Company, the Inland Waterways Corporation, the Mississippi Valley Barge Line and the Mississippi Valley Association were permitted to intervene as defendants.

Appellees asserted that the Act of Congress first above mentioned, as construed and acted upon by the Commission, is unconstitutional because it denies Appellees the right to offer testimony and show facts, circumstances and conditions so as to enable the Commission, before entering said order, to determine whether the public interest requires the routes combining the water service of American Barge Line Company with rail routes under the rates ordered; whether such rates should be lower than the contemporaneously existing all-rail rates; a comparison of the transportation costs via the routes ordered with transportation costs via all-rail routes; a comparison of the needs of Appellees for revenue with the financial needs of American Barge Line Company; whether the establishment of such routes and rates would substantially impair the revenues of Appellees; and whether, having regard to the level of the all-rail rates, public interest and the maintenance of an adequate transportation system required or permitted the establishment of said

joint routes and rates. They identified their injury as the loss in revenue on cotton which, they allege, will be diverted to the joint routes.

Appellants contended that the Appellees had not exhausted their legal remedies; that they neither alleged or proved the existence in them of any legal right which was injured or threatened; that the Statute did not deny Appellees a hearing but, on the contrary, provided for an adequate one, and that the showing Appellees allege they could make at such hearing would be immaterial; and that Appellee's essential pleadings were mere conclusions and suppositions which could form no basis for equitable relief. The essential allegations in the Bill were denied under oath and it was moved that the Bill be dismissed.

The hearing before the three-judge Court (U. S. C. Title 28, Sec. 47) on Appellees' motion for preliminary injunction was, in accord with stipulation (R. 116), considered by the Court as a final hearing on the merits. No evidence was taken. The case was tried and disposed of on the pleadings and affidavits appearing in the printed record, except that, by error, Exhibit A to the affidavit of General T. Q. Ashburn (R. 75) was omitted in printing and Exhibit B was printed (R. 76) as Exhibit A to this affidavit.

Two of the Judges hearing the case, in separate opinions (R. 117 to 127) awarded to Appellees the relief asked for but on different grounds. The third Judge believed the Bill should be dismissed because Appellees had not shown any property right which was actually injured or threatened with injury.

The opinion written by Circuit Judge Thompson may be fairly construed to grant relief in Equity without requiring the showing of a real or threatened deprivation of property right merely because the order complained of was "unquestionably and admittedly made by the Commission without according the Plaintiffs an opportunity to submit evidence or examine and cross-examine witnesses". (R. 125.) The concurring opinion by District Judge Nields is

based upon the belief that "the hearing by the Commission after filing of its order is a hearing after deprivation of property." Neither in the opinions nor in the findings of fact and conclusions of law do the Judges point to any deprivation of property that has accrued or may accrue. The dissenting opinion by District Judge Dickinson calls attention to the proposition, admitted by the Plaintiffs in the Court below (Appellees here), that the rail carriers have no property right in prospective traffic or traffic not committed to them and expresses his belief that the order in question can not deprive Appellees of property that has no existence.

From the decree by the lower court annulling and setting aside the order of the Commission and enjoining its enforcement appeal has been perfected to the Supreme Court by all the defendants and this Brief is submitted in that behalf after probable jurisdiction was noted by the last mentioned Court.

ASSIGNMENTS OF ERROR.

The District Court erred:

1. In holding and deciding that section 3 (e) of the Inland Waterways Corporation Act, as amended, U. S. Code, title 49, c. 5, section 153 (e), in authorizing the Interstate Commerce Commission to establish joint rail and water rates without hearing or evidence, constitutes a delegation of pure legislative authority contrary to the provisions of article I, section 1, of the Constitution of the United States.

2. In holding and deciding that section 3 (e) of the Inland Waterways Corporation Act, as amended, in authorizing the entry of an order and compliance therewith, without hearing, denies the parties the right to a judicial review of such order and that such action is arbitrary and unreasonable and in violation of the fifth amendment to the Constitution of the United States.

3. In holding and deciding that the constitutional right of plaintiffs to a full and fair hearing is not complied with by the provision in said section 3 (e) for a subsequent hear-

ing upon the filing of a complaint as provided for and specified in said section.

4. In holding and deciding that the action of the Interstate Commerce Commission in denying plaintiffs' petitions for a hearing and in requiring joint rail and water rates to be established without such a hearing or opportunity to be heard constituted a denial of due process of law, in violation of the fifth amendment to the Constitution of the United States.

5. In not holding and deciding that the provisions of section 3 (e) of the Inland Waterways Corporation Act was a valid and constitutional exercise of the power of Congress.

6. In not holding and deciding that the provision in said section 3 (e), requiring the Interstate Commerce Commission to proceed to a hearing upon the filing of a complaint by an aggrieved carrier, satisfied the due process clause of the fifth amendment.

7. In not holding and deciding that the plaintiffs had failed to exhaust their administrative remedies and that such failure barred the granting of the relief which they sought by their bill.

8. In not holding and deciding that no legal rights of the plaintiffs are affected or threatened by the said order of the Interstate Commerce Commission.

9. In not holding and deciding that plaintiffs failed to allege and prove that any legal injury resulted or would result from the order of the Commission.

10. In entering a decree setting aside the order of the Interstate Commerce Commission and enjoining the enforcement of said order.

11. In not dismissing the bill of complaint.

SUMMARY OF ARGUMENT.

The Inland Waterways Corporation, although not directly interested in the rates under attack, operates in common carriage on the Mississippi River and tributaries, except the Ohio, and its tariff structure consists largely of routes and rates mandated by the Interstate Commerce Commission under the statute which appellees claim to be unconstitutional.

This appellant is interested in sustaining the statute and thus preserving the benefits of the large expenditure of time and money on the part of this appellant and of the appellees that has already occurred under the formulas for determining routes and rates laid down by the Commission.

The procedure under the statute is expeditious, practical and fair, consisting of six steps, one of which affords appellees abundant opportunity for a full hearing as to all pertinent matters.

The statute provides for a full hearing prior to the time when appellees' rights are fixed or in any wise affected, and the constitutional provisions guaranteeing due process of law are fully complied with.

Appellees' claim that Congress has improperly delegated to the Commission legislative power rests upon the thought that a hearing has been denied appellees, and this point turns upon the question of due process. If the opportunity for due process has been adequately afforded, the contention as to improper delegation of power falls.

Appellees' suit has been prematurely brought because their bill affirmatively shows that appellees have failed to exhaust their administrative remedies.

Even if the law be unconstitutional and if the suit has not been prematurely brought, the bill should be dismissed because appellees have not alleged any property right in them which is taken or threatened, and, further, appellees have not supported their allegations as to such property right by competent evidence.

ARGUMENT.

(Note: All routes and rates in which water service combines with rail will be referred to herein as "joint". When no water service is included the reference will be to "all rail".)

This Appellant's Interest.

A large amount of its business in the common carriage of freight on the rivers moves via routes and on joint rates prescribed by the Commission in orders arrived at substantially as were those under attack in this case. Its operating revenues are, largely, derived from this business. It is the information of this Appellant that if the contentions made by Appellees herein are sustained, the rail lines will withdraw from participation in such joint rates and refuse to negotiate with this Appellant looking to the establishment of additional joint routes and rates in connection with this Appellant's Barge Line under the said orders of the Commission (R. 51, 52, 74, 75).

The results of the instant case are likely, therefore, to extend further than the routes and rates under direct attack. The methods devised by Congress for an expeditious handling of such matters are in danger of destruction and the results of the expenditure of a large amount of time and money by the interested carriers by barge and the rail carriers (R. 75) in checking in joint routes and rates in compliance with the formulas laid down in said orders of the Commission will be either immediately nullified or seriously jeopardized.

For these reasons this Appellant presents arguments in defense of the statute under attack before those criticizing the method of the attack.

The arrangement provided for in said statute is practical, simple, expeditious and just. It contemplates six procedural steps:

First. Application by Barge Line to the Commission for a certificate of convenience and necessity (Sec. 3(e), Barge Line Act, Appendix A).

Second. A full hearing is accorded by the Commission (Sec. 3 (e) *ibid.*). Confined to the question whether applicant is entitled to the certificate (R. 33).

Third. Certificate granted if proper showing made and thereupon the Commission orders joint routes to be established on differential rates tentatively fixed or provided for in the order. These must be reasonable (3(e) *ib.*). The order may not, however, take effect before the expiration of such reasonable time as may be fixed by the Commission (U. S. C. 49, Par. 2 of Sec. 15).

Fourth. Complaint by any affected carrier which may or may not include a prayer for supersedeas (15 (7) *ib.*).

Fifth. Suspension of the order granted by the Commission if good cause shown, pending a hearing. (Rule XIX of the Interstate Commerce Commission's Rules of Practice.)

Sixth. A full hearing as to the propriety of the Commission's order given preference over all other matters, at which the complaining carrier has the burden of proof concerning the unreasonableness or unlawfulness of the order.

The orders under attack were made in accordance with the first three steps but the other steps have not been taken because the water carrier involved is apparently satisfied and the rail carriers concerned, although dissatisfied, have carefully refrained from filing any complaint as required by statute, evidently desiring to avoid, if possible, sustaining the burden of showing the "unreasonableness or unlawfulness" of the joint arrangement set out in the Commission's order.

One of Appellees' reasons for attack on the order is that the Commission has misconstrued the law.

It would unnecessarily prolong this brief if we attempted to answer the arguments advanced on this reason. The present Sec. 3(e) of the Barge Line Act either means

nothing or it must be construed as the Commission has done. We are content to rest this phase of the case upon that portion of the opinion of the Court below which sustains the Commission's construction (R. 123 to 125).

THE COMMISSION HAS NOT MISCONSTRUED THE STATUTE.

Opinion of the Lower Court, R. 123 to 125 incl.
Procedure under Barge Line Act, 148 I. C. C. 129.
Lake County vs. Rollins, 130 U. S. 670.
Bate Refrigerator Co. vs. Sulzberger, 157 U. S. 1.
U. S. vs. First National Bank, 234 U. S. 245.
Caminetti vs. U. S., 242 U. S. 470.
U. S. vs. M. P. R. R., 278 U. S. 269.
Russel Motor Car Co. vs. U. S., 261 U. S. 514.
Through Routes and Joint Rates, 153 I. C. C. 129.
Application of American Barge Line Co., 107 I. C. C. 44.
Powers Machine Co. vs. U. S., 282 U. S. 375.
Logan vs. Davis, 233 U. S. 613.
U. S. vs. Hammers, 221 U. S. 220.

THE STATUTE AS CONSTRUED BY THE COMMISSION IS NOT UNCONSTITUTIONAL BECAUSE IN CONTRAVENTION OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES.

Another reason for Appellees' attack is that the law as construed constitutes an unwarranted delegation of Legislative Authority.

Field vs. Clark, 146 U. S. 649.
Butterfield vs. Stranahan, 192 U. S. 471.
U. S. vs. Grimaud, 220 U. S. 506.
St. L. I. & S. Ry. vs. Tayler, 210 U. S. 281.
U. S. vs. Goodrich, etc., 224 U. S. 194.
K. C. S. Ry. vs. U. S., 231 U. S. 423.
I. C. C. vs. Brimson, 154 U. S. 447.
St. L. S. V. Ry. vs. U. S., 245 U. S. 136.
Prentis vs. Atlantic, etc., 211 U. S. 210.
Iron Mountain Rate Cases, 234 U. S. 476.
Wichita R. R. vs. Pub. Utilities Comm., 260 U. S. 48.

Mutual Film Corp. vs. Ohio Ind. Comm., 236 U. S. 245.
Hampton vs. U. S., 276 U. S. 394.
N. Y. Central Securities Co. vs. U. S., 287 U. S. 12.
Fong Yen Ting vs. U. S., 149 U. S. 698.

It is surprising to find any railroads who have not become, at least, reconciled to the right of Congress to delegate to the Commission control over rates, and it may be that Appellees do not mean to question this right, yet nothing short of this can be made out of the allegation in Paragraph X of their Bill (R. 15). If they admit the right to delegate in some instances but deny it here, the denial must rest upon the contention that no provision for prior hearing was made. The matter of prior hearing is not involved in the contention as to the right to delegate. It is an integral part of the controversy as to due process. Further, if the failure to provide a prior hearing is the only fault, and if such a hearing be necessary towards constitutionality, Appellees' complaint is not against unwarranted delegation but is to be translated as a complaint that Congress has delegated to the Commission a power to do what is unconstitutional.

We have not had the advantage of any discussion by Appellees on this point. In the Court below they contented themselves by asserting unconstitutionality on this ground by way of a proposition under which they cited, without argument, a number of authorities the examination of which does not aid us in discovering Appellees' line of reasoning.

In spite of our confusion as to what Appellees contend on this point, the proposition appears to be seriously asserted and, as well, differentiated from Appellees' propositions as to due process. Hence we feel that we must discuss it separately.

The Courts have sustained Acts which delegated to agencies the powers which the Legislature may rightfully exercise itself. See Wayman vs. Southard, 10 Wheat. 1. Also

the power to determine matters as to duties on imports. See Field vs. Clark (*supra*). To make regulations for sheep raising in government reservations and make violations thereof criminal. See *U. S. vs. Grimaud* (*supra*). To delegate to American Railway Association, a private body, the function of ascertaining, without hearing, the standard weight of draw bars for freight cars. See *St. L. I. & S. Ry. vs. Taylor* (*supra*). To the Interstate Commerce Commission the power to prescribe the manner in which accounts of Railroads should be kept. See *U. S. vs. Goodrich*, etc. and *K. C. S. Ry. vs. U. S.* (*supra*). To investigate the whole subject matter of Interstate Commerce and to require attendance of witnesses (see *I. C. C. vs. Brimson, supra*); To compel the establishment of rates. (*St. L., S. V. Ry. Co. vs. U. S., supra.*)

Among the following cases cited by Plaintiffs in the Court below (Appellees here) under their proposition on this point, we find *Prentis vs. Atlantic, etc.* (*supra*), wherein, although the case went off on another point, this Court apparently believed that rail rates fixed by a Commission to whom authority had been delegated by the Legislature were not open to constitutional question; also *Iron Mountain Rate Cases* (*supra*), wherein this Court held the long- and short haul provisions of the Acts to regulate commerce were not repugnant to the Constitution as an improper delegation of legislative power; *Wichita R. R. Co. vs. Pub. Utilities Comm.* (*supra*) wherein the Court did not question the delegation to the Commission of powers but held that the Commission's findings did not justify its order; *Mutual Film Corp. vs. Ohio Ind. Comm.* (*supra*), wherein the delegated right of a commission, with very scant hearings, to censor motion picture films was upheld; *Hampton & Co. vs. U. S.* (*supra*), which upheld delegation of power to the President to increase or diminish tariff duties; *N. Y. Central Securities Co. vs. U. S.* (*supra*), which upheld the Commission's delegated authority to permit assumption by one railroad of indebtedness of other roads; *Fong Yen*

Ting vs. U. S. (*supra*) and other exclusion cases, upholding delegation to Revenue Collectors of the right to make certain determinations as to Chinamen. We think these cases fully sustain our proposition and negative that of Appellees.

THE LAW, AS CONSTRUED BY THE COMMISSION, AFFORDS ABUNDANT OPPORTUNITY FOR A FULL HEARING AND, THEREFORE, DOES NOT DENY DUE PROCESS.

This proposition negatives the final reason in Appellees' attack.

If the statute assured a hearing anterior to the effectiveness of the mandated routes and rates, the rail lines would not have brought this suit unless, indeed, a hearing is not so much their desire as is a destruction of the statute. We, therefore, assume that their contentions rest upon the thought that the law does not adequately provide for a hearing.

THE CONSTITUTIONALITY OF THE LAW DOES NOT DEPEND UPON ANY EXPRESS PROVISION FOR A HEARING. THE TEST, UNDER THE DUE PROCESS CLAUSES, IS: HAS A HEARING IN DUE COURSE OF LEGAL PROCEEDINGS BEEN DENIED IN SUCH TERMS THAT THE COMPLAINANT HAS NO OPPORTUNITY TO BE HEARD BEFORE HIS RIGHTS BECOME FIXED.

Rees vs. Watertown, 19 Wall. 107.
Pittsburgh, etc. Ry. vs. Backus, 154 U. S. 421.
Hodge vs. Muscatine, 196 U. S. 276.
Hagar vs. Reclamation Dist., 111 U. S. 701.
Davidson vs. New Orleans, 96 U. S. 97.
New Haven R. R. vs. I. C. C., 200 U. S. 361.
U. S. vs. Antikamnia Co., 231 U. S. 654.
Ash Sheep Co. vs. U. S., 252 U. S. 159.
Goldsmith vs. Board of Tax Appeals, 270 U. S. 117.

Home Telephone Co. vs. Los Angeles, 211 U. S. 265.
New Haven R. R. v. I. C. C., 200 U. S. 361.

In many of the Tax cases bearing on this point, there was no express provision for a hearing of the disgruntled taxpayer, yet all uphold the otherwise lawful assessments against attacks based on lack of due process, as is illustrated by the case of *Pittsburgh Ry. vs. Backus* (*supra*), wherein the Court notes that the tax board "has a time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of anyone before it to assert a right, or redress a wrong," and states, "a hearing before judgment, with full opportunity to present all the evidence and arguments which the party deems important, is all that can be adjudged vital."

Other tax cases concern legislation providing for a hearing and are illustrated by *Hodge vs. Muscatine* (*supra*), wherein the law permitted the taxpayer to make application for a hearing to remit the tax. This parallels the provision in the Barge Line Act which provides for hearing on complaint. If the application was denied, he could apply to the District Court for judicial determination as to liability. In the instant case, if the Commission refused supersedeas during hearing on complaint, Appellees might be able to allege a real, not imaginary, threat to their rights, to protect which they could apply to the Courts for supersedeas. In the case last cited the Court held that if opportunity was given "to test the validity of the tax at any time before it is made final * * * due process is not denied." The learned District Judge who joined in the majority opinion in this case by the lower Court appears to believe that the doctrines announced in Tax cases do not apply in cases like the one now before the Court and he calls attention to the cases of *Hagar vs. Reclamation District* (*supra*), and the *Standard Oil vs. McLaughlin*, 55 Fed. (2nd) 274, in support.

The first case he mentioned does make a distinction be-

tween what may be necessary to constitute due process in tax cases and what is needed in cases involving the taking of life, liberty, or property. However, the language used contains nothing to indicate that, in an appropriate case not involving taxation, a similar kind of hearing as was afforded in the *Hagar* case would not have constituted due process. In fact, Mr. Justice Field, in the *Hager* case, quotes with approval from *Davidson vs. New Orleans* (*supra*), as follows:

> "In judging what is 'due process of law' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

Tested by the views of the two Justices here quoted, we find the "cause of the taking," if there be any taking, in the instant case, was, as is shown by the House Report quoted by the lower Court in its opinion (R. 124), opposition on the part of many of the Rail roads which had resulted in years of delay in the extension of the benefits of water transportation to interior communities and the "object" was to make available through routes, joint rates and an equitable division of joint rates, to afford to the people of a large part of the country the economies of cheaper transportation by water. It is by this cause and object that the provisions of the statute which Appellees attack should be measured. If the views of Appellees are sustained, the object will be defeated and the thing which caused the legislation will go unremedied.

The other case noted by Judge Nields (R. 127) merely cited the *Hager* case.

The interest of the Legislature is the ever insistent consideration in the interpretation of statutes which are to be

construed so as to effectuate the purpose sought to be achieved. See *New Haven R. R. vs. I. C. C.; U. S. vs. Antikamnia Co.; Ash Sheep Co. vs. U. S.* (*all supra*).

Nor is this reasoning applied exclusively to tax cases.

The case of *Goldsmith vs. Board of Tax Appeals* (*supra*) was one in which the plaintiff, having been denied without hearing the right to practice before the Board, without asking the Board to give him hearing, went to Equity in an effort to mandamus the Board. The Court called attention to the fact that he was entitled, as a matter of law, to a hearing which was not expressly denied him, but refused relief because he had not sought a hearing. This parallels the instant case and indicates that it has been prematurely brought, a point to be discussed later.

In *Home Telephone Co, vs. Los Angeles* (*supra*), the validity of telephone rates fixed by the City Council without a formal hearing was involved. The ordinance requiring regular meetings of the City Council did not specifically provide otherwise for a hearing but authorized fixing of rates on statements of receipts, expenditures, etc., to be rendered annually by the Telephone Company. The Company declined to furnish the information, and the rates having been fixed, attacked them in the equity courts alleging lack of due process. The Court held that "a sufficient notice and hearing were offered to Appellant, if it had chosen to avail itself of them, instead of declining to furnish all information as it did." We contend that in the instant case a sufficient opportunity for a hearing has been at all times open to Appellees, if they had chosen to utilize it.

THE STATUTE AFFORDS OPPORTUNITY FOR A HEARING BEFORE RIGHTS ARE DESTROYED OR PROPERTY TAKEN.

The only acts required by Appellees to secure a hearing are to file the mandated schedules with the Commission and their complaint against them.

EQUITY COURTS WILL NOT ASSUME, IN ADVANCE, THAT A STATUTE WILL BE ADMINISTERED IN AN UNCONSTITUTIONAL WAY, IF IT MAY BE ADMINISTERED CONSTITUTIONALLY.

St. Louis S. W. Ry. vs. Arkansas, 235 U. S. 351.
Barge Line Act, Sec. 3(c) (*supra*).
Sec. 15 (7), Interstate Commerce Act (*supra*).

Presumption that the act is valid.

Chicago, Milwaukee, etc. vs. Massachusetts, 207 U. S. 79.

In case of real doubt the law must be sustained.

Bradley vs. Richmond, 227 U. S. 477.
Arizona Gro. Co. vs. Atchison Ry., 284 U. S. 370.
Prentis vs. Atlantic, etc., 211 U. S. 210.
L. & N. vs. Garrett, 231 U. S. 298.
Terminal R. R. vs. U. S., 266 U. S. 17.

In the St. L. S. W. Ry. case just cited, the Court said: "We ought not to indulge the presumption either that the legislature intended to exceed the limits imposed upon State action by the Federal Constitution or that the Courts of the State will so interpret the legislation as to lead to that result."

The issue in the case just quoted from was the validity of a state statute which required payment by a Railroad of a franchise tax and that authorized the forfeiture of the Road's right to do business in the State if the tax was not paid. At the time of pendency of the suit the State had not moved to forfeit but was suing for the tax as a debt. To destroy the statute and thereby avoid the debt, the Railroad contended that the statute authorized the forfeiture and was therefore unconstitutional.

The analogy between the case just quoted from and the instant case appears to us to be close.

In Bradley vs. Richmond (*supra*), involving a licensing ordinance, classification was first made and then notice and opportunity to be heard was afforded. In the instant

case the carriers are granted a hearing if they first file the schedules. Appellees appear to think that such a hearing will not afford them protection and they ask this Court to presume that it will not. The words of the opinion in the case last mentioned are peculiarly applicable to this state of affairs. The Court said:

> "If the right to appear and be heard and to obtain a review should prove illusory, there would, under general rules of jurisprudence, remain the right to judicial review, if the result should violate either a right received under the law of the State or that of the United States."

Should Appellees assert that this quotation refers to the right which they are asserting in the instant case, we retort that they do not here seek a review but a cancellation. This Court cannot review the matter of rates. This is a purely legislative function. Arizona Grocery Co. vs. Atchison Ry.; Prentis vs. Atlantic Coast Line; L. & N. Ry. vs. Garrett (all *supra*). Appellees are attempting to destroy the statute rather than obtain a review.

SINCE THE STATUTE PROVIDES A MEANS FOR A HEARING THAT MAY BE EFFECTIVELY AVAILED OF BEFORE PROPERTY IS ACTUALLY TAKEN, IT IS NOT A DENIAL OF DUE PROCESS AND IS CONSTITUTIONAL.

Londoner vs. Denver, 210 U. S. 373.

This case, cited by Appellees in the Court below, was one brought in the Courts of Colorado to relieve lands from an assessment of tax for the cost of paving, the contention being that the statute involved denied due process. In the course of the proceedings the provision of the statute providing for notice and opportunity for hearing was not followed but the City Council sent out notice that it would hear and consider written complaints, but appointed no time and place and did not set for hearing nor hear the

Plaintiff's complaint. The Court expressly sustained the statute as constitutional so that it does not appear to be in point under Appellees' contentions. We desire, however, to call attention to the very clear statement of Mr. Justice Moody of the principle here involved, which is applicable generally as well as in tax cases. He said, the emphasis being ours:

> "In the enforcement of such restrictions as the Constitution does impose this Court has regarded substance and not form. But when the Legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be laid, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings, *before the tax becomes irrevocably fixed*, the taxpayer shall have an opportunity to be heard."

It will be further explanatory of this case if we add his further words: "It must be remembered that the law of Colorado denies the landowner the right to object in the Courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization."

The additionally quoted words indicate that the learned Justice believes that if opportunity for review by the Courts had not been denied by the statute, the Equity Arm would not have interfered. If so the litigant in that case would have been required, as Appellees should be required to do in this case, to exhaust his legal remedies before appeal to Equity.

Appellees cite the Dartmouth College case, 4 Wheat. 517, and others which involve the question as to whether laws are unconstitutional because they impair the obligation of contracts. We are unable to discover how they throw light on the instant case.

The cases cited in the Court below by Appellees, involving questions arising under the Interstate Commerce Act, are not applicable to the instant case because that act ex-

pressly provides prior hearings while in this case the hearing is provided for after the entry of the Commission's order tentatively fixing rates.

Most of the cases so cited by appellees not involving said Act are so far from supporting Appellees' contentions that we believe they support ours. An instance is the case of Murry vs. Hoboken Land Co., 18 Howard, 272, which, if applicable at all, is distinctly in support of our last above proposition.

THIS SUIT IS PREMATURELY BROUGHT, APPELLEES HAVING FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.

The latest case enunciating the principles here relied on is, we believe, Porter vs. Investors Syndicate, 286 U. S. 461, wherein it appeared that the State of Montana had confided jurisdiction of the administrative details of a law regulating the conduct of investment business within the State to a Commissioner whose permit was required as a condition to conducting such business and who was given authority to cancel any such permit. The Syndicate's permit had been so cancelled. The law gave the State District Court the right of review of all orders of the Commissioner. Without asking for such a review, the Syndicate sought, in the Federal Court, to enjoin enforcement of the order of cancellation. A statutory three-judge court granted the injunction, and an appeal was taken. In reversing the decree awarding injunction, the Court said:

> "We are of opinion that the appellee failed to exhaust its administrative remedy before applying to the district court for injunctive relief. The granting and revocation of permits is an exercise by the appellant of delegated legislative power. Section 4038 of the Code (*supra*) confers on any interested person dissatisfied with a finding or decision by the Commissioner, the right within thirty days to bring an action against him in a state district court to vacate his order

> and set it aside as unjust or unreasonable, and directs that on the hearing the judge 'may set aside, modify, or confirm said * * * decision as the evidence and the rules or (*sic*) equity may require.' The section confers the right to appeal to the state supreme court from the judgment of the trial court. Clearly the function of the state district court under the statutory mandate is not solely judicial, that is, to set aside a decision of the commissioner if arbitrary or unreasonable and hence violative of constitutional rights. * * * The legislative process remains incomplete until the action of that court shall have become final. * * * And the capacity in which the court acts is none the less administrative because the proceeding is designated as a suit in equity instead of by appeal. * * * When the appellee was notified on June 22, 1931, that the rule adopted by the appellant would become effective July 22nd of the same year an action could have been filed in the state court and a hearing had upon all questions of fact and law touching the propriety of the order."

Here is a direct holding which, if applied to the instant case, would require that Appellees, before resorting to the Equity Arm of the Courts, exhaust their administrative remedies. The legislative function vested by the statute in the State Courts corresponds to the function of review on complaint vested in the Commission. A decision more nearly final had been made by the Commissioner in the Investors Syndicate case than in the instant case in that, if the right to supersedeas existed at all in the former case, it arose by implication only. The situation of Appellees is more fortunate. The statute expressly gives the Commission the right to supersede (Sec. 15 (7) *supra*). It is likely that they could have obtained supersedeas before the rates became effective by merely asking the Commission for it.

In their briefs below Appellees contended that they were pursuing, in this case, "the only remedy available to them and one expressly provided for by statute," and cited Wadley Southern Ry. vs. Georgia, 235 U. S. 651, in support.

This is an interesting case, particularly because its characteristics are so similar to those of the instant case. In both a Railroad refuses to obey orders of a Commission, contending they are void. In both the statute provides a remedy by way of hearing or review which the railroad refuses to avail itself of. In both the Railroad contends that it could not do so without being liable to pay statutory penalties. We fear the analogy stops at this point. The suit was brought by the State to collect penalties which the statute provided against refusal to obey the Commission's orders and it may be that the application of the legal principles involved takes a different turn from that proper in the instant case. If the latter was a suit to collect the penalties which Appellees refer to in paragraph XI of their Bill (R. 16), viz., "irreparable injury will occur to plaintiffs in that they will be compelled under the severe penalties prescribed by the Interstate Commerce Act," etc., the two cases would be almost exactly parallel. The extent of differentiation is such, however, that the most that we feel justified in claiming is that the Wadley Southern case does not support Appellees' contention but is persuasive on the proposition that Appellees are not entitled to equitable relief until after they have attempted and failed to secure protection of such legal rights as they may have by filing a complaint with the Commission.

APPELLEES HAVE NOT SHOWN THAT ANY OF THEIR LEGAL RIGHTS HAVE BEEN OR WILL BE TAKEN BY SAID ORDER NOR THAT THEY OR ANY OF THEM WILL SUFFER ANY LOSS OF PROPERTY UNLESS THE EXECUTION OF THE ORDER IS ENJOINED.

The averments affecting the above proposition are twofold, one being that the Commission was without jurisdiction to enter said order because it denied Appellees the right and opportunity to show, by testimony, six things. (R. 13 and 14.)

The first showing they say they would have made is "that the public interest did not at any time and does not now require the establishment" of the routes and rates mentioned in said order; the second is that, if the routes were established, the joint rates should not be lower than the all-rail rates.

So much of the Statute in question which authorized the Commission to grant or refuse to grant, according as its findings as to public convenience and necessity might dictate, a certificate to the American Barge Line, is not attacked nor criticized by the Appellees. Neither is the provision attacked which gives a certificated barge line the right to operate in connection with rail lines on differentially constructed rates. The Commission, after a full hearing (R. 33) in which the rail carriers participated, had granted such a certificate before the order in question was applied for and the Commission had remarked in the course of the proceedings (R. 34):

> "Under the Denison Act the establishment of appropriate joint rail-and-water rates, when and if a certificate is granted, flows from the mandate of the Statute. The possible effects of such establishment in depriving rail carriers of some traffic and earnings which they might otherwise continue to hold to their lines, is a matter of policy which the Congress must be presumed to have taken into consideration in the enactment of the Statute and is not a matter which we are authorized to consider, etc."

The words "public interest," as used in the allegation, can have no significance that is not also included in the words "public convenience and necessity." From this it follows that the first showing which Appellees allege they could have made had been foreclosed, both by the Statute and by the Commission, prior to the date of the application for the order complained of. Manifestly, the showing under this allegation would not have been pertinent to any hearing such as suggested by Appellees.

As to the second showing, the Commission has stated its opinion to be that "under the law the differentials must be such that the joint rail-water transportation to which they relate shall be upon terms reasonably fair to both rail and water carriers, not designed to divert traffic from one or the other, but to reflect differences in cost and value of service." (R. 21, 22.) If the Commission's view as to what the law requires be correct, and we think it is so, a showing by Appellees under their second allegation would have availed them nothing.

The next showing which Appellees assert they could have made is that the transportation costs via the joint routes are and would be substantially equal to the transportation costs via all-rail routes. Whether they mean to refer to the costs to the public or those of furnishing the service is not plain, but it may safely be inferred that it is the latter costs that they refer to. If this be true, it is possible that such a showing, if made, would be pertinent to the inquiry, but the difficulty here is that the allegation is a mere statement of supposition or conclusion on the part of the pleader, concerning which absolutely no proof has been offered. The question of support of these allegations by proof will be adverted to later.

The next three showings which Appellees allege they might have made refer to the fact that each of the Appellees has been and is in need of revenue which they state will be substantially impaired by the order. Here we find further matter that would not be pertinent to any inquiry concerning the complained of order. On March 11, 1932, the Commission reported on the application of American Barge Line Company (R. 34) and, among other things, states:

> "The opposing rail carriers state that their facilities are more than adequate to handle all traffic offered for shipment between points which would be affected by the application and stress the adverse effects on their already diminished traffic and earnings which they claim will result from the differential joint rail-

and-water rates which would be required to be established if the certificates were granted."

It should be noted here that the Commission was considering the application for a certificate upon which a 'full hearing' had been accorded. The Commission then disposed of the point in the following language (R. 34):

> "These representations are similar to those made by rail carriers in other proceedings of this nature and which we have found not to be such as to warrant the withholding of a certificate to a water line otherwise entitled thereto."

From all the above it clearly appears that even if the Appellees had been granted a hearing and afforded an opportunity to show the six things which they allege they could have shown, only one of these six could possibly have affected the question involved in such a hearing, and that showing, if it had been made by the most satisfactory proof possible, would have affected only one of the elements which the Commission regarded as at all determinative in arriving at the solution of the problem, namely, differences in cost of service. There would still have been left the element of difference in value of service as between joint rail-and-water and all-rail rates.

We do not contend that it is a sufficient answer to Appellees' contention of lack of due process to say that if due process had been accorded, the order would not have been changed. Our remarks are now addressed to the sufficiency of Appellees' allegations and we contend that these show that they have suffered no injury by being denied an opportunity to prove the things they say they would have proved. The allegations here criticized were descriptive of the injury, not of the reason for it.

The mere fact that a duly enacted law is unconstitutional does not entitle Appellees to relief by injunction against proceedings in compliance therewith. McChord vs. L. & A.

R. R., 183 U. S. 483. Injury must be alleged and the allegation must be tested by its own terms.

The other averment is substantially that Appellees will lose future traffic and the revenue therefrom. There is no assertion in the Bill nor in the affidavits filed by appellees nor elsewhere in the Record, either by way of allegation or proof, that Appellees or any of them will suffer any loss except of prospective traffic which may be diverted to the joint routes mentioned in the order. Every averment and every affidavit statement affecting this point is prospective, not immediate, in its terms. The statements are to the effect that traffic "will be diverted" from the rails, thus causing Plaintiffs damage and loss. (R. 11, 12.) The findings of fact filed by the lower Court contain nothing to aid this situation. The words therein which most nearly approach a finding of deprivation of property occur in the third finding (R. 118) and refer to future traffic:

> "The natural and normal effect of such participation (by the rail lines) in through routes and rates with the American Barge Line Company would be to divert cotton, in carloads, from the all-rail routes previously established to the lower rail-barge-rail and barge-rail routes."

The averments as to future loss of traffic are conclusions and argumentative deductions which were traversed and, under the rules of pleadings, are not to be considered as admitted. I. C. C. vs. Goodrich Transit Co., 224 U. S. 194. The affidavits submitted by Appellees are subject to the same criticism. None of the affiants qualifies as an expert on the subject except, possibly, General Ashburn, whose affidavit was presented by this Appellant (R. 74, 75, 76). He claims familiarity during more than eight years with the interchange of freight "moving via rail and water carriers in joint through routes" and states that "transportation via barge line is necessarily and inherently slower and less desirable to shippers than is transportation by rail,

and that in order to attract any business the barge line must be able to quote rates that are considerably lower than those quoted by the rail carriers." All the other affiants claimed no more than familiarity with Railroad traffic matters. Not one of these asserts that he has either studied or had experience with the effects on the movement of cotton or other freight caused by barge competition. They assert that the rates complained of will divert cotton from the rails but they are not speaking as experts when they do so and, so far as the Record shows, their opinion on the matter is no more evidential than would be the guess of any man on the street.

The most that can be said of the Record on this phase of the case is that the order names joint rates on cotton that are from four to eight cents per hundred pounds lower than all-rail rates (R. 23), that the lower rates are partly via barge and less desirable to shippers than all rail and that to attract business barge rates must be considerably less than all-rail. The finding of the lower Court above quoted is based wholly upon a conclusion which we contend is unwarranted, as to the "natural and normal effect" of this state of affairs. As to whether or not these joint rates are sufficiently low to attract business is left to conjecture. No affiant claims to know of any shipper who will utilize the joint rates and no one professes to definitely know that a single bale of cotton will be diverted from the rails. It is by no means safe to assume that diversion will occur.

We therefore contend that the Record is wholly devoid of any showing of loss or injury that should be recognized as such even under the liberal rules of equity procedure; but even if we assume that the showing is sufficient, the loss or injury is not such as will support the Bill.

The allegations of the Bill do not contain the element of confiscation. The alleged result of the order as "unlawfully diverting shipments of cotton from the all-rail routes" is the sole basis of injury alleged or shown.

The able District Judge Dickinson based his dissent from the majority opinion below upon the thought that the Appellees have no property right in prospective traffic.

A. T. & S. F. Railway vs. U. S., 279 U. S. 768.
Penn. R. R. Co. vs. U. S., 40 F. (2d) 921.
Indian Valley R. R. vs. U. S., 52 F. (2d) 485.
Pittsburgh, etc. Ry. Co. vs. U. S., 281 U. S. 479.
Sprunt and Son vs. U. S., 281 U. S. 249.
Hines, Trustee, vs. U. S., 263 U. S. 143.
Claiborne-Annapolis Ferry vs. U. S., 285 U. S. 382.

In all of these cases the desire on the part of the carrier to continue to enjoy in the future as it had in the past either the benefits of a competitive advantage or a monopoly in transportation was asserted as if it was a legal right entitled to protection under the constitutional guarantees. In all such cases the courts refused to sanction such an assertion and uniformly held to the effect that a carrier had no legal right to continue in the enjoyment, in the future, of traffic previously handled. It was probably under these cases that appellees' counsel admitted in the Court below the lack of such legal right in their clients.

The Pittsburgh Ry. case (*supra*) appears to have been overruled by the Ferry case (*supra*) in that the former held that the carrier, asserting no more than desire to enjoy prospective traffic, had no right to bring suit to enjoin the construction of competitive facilities, while the latter case held that such desire created a sufficient interest to permit the bringing of the suit but did not recognize such desire as a legal right to be protected by the Courts. In the Pennsylvania R. R. case and the Indian Valley R. R. Co. case (*supra*) the holding was that the desire to continue to enjoy traffic in the future is not a right upon which a suit to enjoin the construction of a competitive line could be *based*. In the Hines, Trustee, and Sprunt and Son cases (*supra*) the holding was worded slightly differently but it was to the same effect, namely, that such a suit could not *be main-*

tained on a showing of rights in prospective traffic. In the Santa Fe Railway Co. case (*supra*) the Court refused to recognize that the desire of the originating carrier to retain traffic to its line entitled it to injunctive relief against an order of the Commission disapproving the proposed schedules, and said, "There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originates."

Neither a loss of enjoyment in the future of traffic formerly carried nor a prejudice to a competitive advantage are legal injuries which will support appellees' bill, hence their case must fail.

CONCLUSION.

The judgment of the Court below should be reversed and Appellees' Bill dismissed.

Respectfully submitted,

CLARK C. WREN,
Solicitor for Appellant,
Inland Waterways Corporation.

APPENDIX A.

Copy of the Act incorporating the Inland Waterways Corporation Public No. 185, 68th Congress, as amended.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the purpose of carrying on the operations of the Government-owned inland, canal, and coastwise waterways system to the point where the system can be transferred to private operation to the best advantage of the Government, of carrying out the mandates of Congress prescribed in section 201 of the Transportation Act, 1920, as amended, and of carrying out the policy enunciated by Congress in the first paragraph of section 500 of such Act, there is hereby created a corporation, in the District of Columbia, to be known as the Inland Waterways Corporation (hereinafter referred to as the "corporation"). The Secretary of War shall be deemed to be the incorporator, and the incorporation shall be held effected upon the enactment of this Act. The Secretary of War shall govern and direct the corporation in the exercise of the functions vested in it by this Act.

(As amended U. S. Code, Sup. VI, Title 49, C. 5 Section 153)

SEC. 2. The capital stock of the corporation shall be $15,000,000, all of which is hereby subscribed for by the United States. Such subscription shall be paid by the Secretary of the Treasury, within the appropriations therefor, upon call from time to time by the Secretary of War. Upon any such payment a receipt therefor shall be issued by the corporation to the United States and delivered to the Secretary of the Treasury, and shall be evidence of the stock ownership of the United States. There is hereby authorized to be appropriated the sum of $10,000,000 in addition to the $5,000,000 heretofore authorized for the purpose of paying such subscription.

"SEC. 3 (a) Until otherwise directed by Congress, the corporation shall continue the operation of the transportation and terminal facilities now being operated by or under the direction of the Secretary of War under section 201 of the Transportation Act, 1920, as amended, and shall continue to operate the facilities now being operated or that may hereafter be operated by it under the provisions of this

Act; and shall, as soon as there is an improved channel sufficient to permit the same, initiate and continue the water carriage heretofore authorized by law upon the Mississippi River above Saint Louis.

"(b) When the improvement of any tributary or connecting waterway of the Mississippi River, not including the Ohio River, shall have been completed or advanced to the point where within two years thereafter there will have been substantially completed a sufficient and dependable channel for the safe operation of suitable barges and towboats thereon; and when the Chief of Engineers of the United States Army shall certify that fact to the Secretary of War, the Secretary of War shall thereupon cause a survey of such tributary or connecting waterway to be made for the purpose of ascertaining the amount of traffic, the terminal facilities, and the through routes and joint tariff arrangements with connecting carriers, that are or will, within such years, probably be available on such tributary or connecting waterway. As soon thereafter as such survey shall have been completed and a sufficient and dependable channel for the safe operation of suitable barges and tow boats shall have been substantially completed, the Secretary of War may, if he finds from such survey that water transportation can, in the public interest, be successfully operated on such tributary or connecting waterway, extend the service of the Inland Waterways Corporation thereon as soon as the corporation shall have suitable facilities available therefor.

"(c) It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until (1) there shall have been completed in the rivers where the corporation operates, navigable channels, as authorized by Congress, adequate for reasonably dependable and regular transportation service thereon; (2) terminal facilities shall have been provided on such rivers reasonably adequate for joint rail and water service; (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; and (4) private persons, companies, or corporations engaged, or are ready and willing to engage, in common-carrier service on such rivers.

"(d) When the Secretary of War shall find that navigable channels and adequate terminals are substantially available as provided in paragraph (c) of this section, and when the Interstate Commerce Commission shall report to the Secretary of War that joint tariffs with rail carriers have been published and filed as provided in said paragraph, the Secretary of War is hereby authorized to lease for operation under private management, or to sell to private persons, companies, or corporations, the transportation facilities, or any unit thereof, belonging to the corporation: PROVIDED, that for the purpose of this paragraph the facilities of the corporation on the Mississippi River and its tributaries shall be considered as one unit, and those on the Warrior River and its tributaries one unit; PROVIDED FURTHER, That the facilities of the corporation shall not be sold or leased (1) to any carrier by rail or to any person or company directly or indirectly connected with any carrier by rail; or (2) to any person, company, or corporation who shall not give satisfactory assurance and agree, as part of the consideration for such sale or lease, that the facilities so sold or leased will be continued in the common-carrier service in a manner substantially similar to the service rendered by the corporation, together with ample security by bond or otherwise to insure the faithful performance of such agreement; or (3) until the same has been appraised and the fair value thereof ascertained and reported to the President by the Interstate Commerce Commission, and the sale or lease thereof has been approved by the President.

"(e) Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of the Interstate Commerce Act, as amended, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and the connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates

and joint rates in connection with said water service to apply until changed by order of the commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The Commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this Act; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: PROVIDED, That if the Inland Waterways Corporation sells or leases its transportation facilities to any person, firm, or corporation to be operated as a common carrier, such person, firm, or corporation shall be entitled to a certificate of public convenience and necessity upon making application therefor; and all through traffic arrangements and joint tariffs with rules, regulations, and practices in connection

therewith published by the Inland Waterways Corporation and filed with the Interstate Commerce Commission and participated in by other carriers shall remain in full force and effect between such carriers and the person, firm, or corporation purchasing or leasing such transportation facilities from the Inland Waterways Corporation and operating the same as common carriers until changed by order of the commission, except that such through-traffic arrangements and joint tariffs, with rules, regulations, and practices therewith, may be changed by mutual consent of the water carrier and the other participating carriers. Joint rail and water rates as herein used shall be deemed to include every movement of traffic in which a water line can participate.

"(f) The operation of the transportation and terminal facilities under this Act shall be subject to the provisions of the Interstate Commerce Act, as amended and to the provisions of the Shipping Act, 1916, as amended, in the same manner and to the same extent as if such facilities were privately owned and operated; and all vessels of the corporation operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels."

SEC. 4. (a) The Secretary of War shall appoint an Advisory Board of six members (hereinafter referred to as the "board") from individuals prominently identified with commercial or business interests in territory adjacent to the operations of the corporation. No member of the board shall be an officer, director, or employee of, or substantially interested in, any railroad corporation. Two of such members shall continue in office for terms of one year, and the remaining four for terms of two, three, four, and five years, respectively, from the date of appointment, the term of each to be designated by the Secretary of War. Each successor shall be appointed by the Secretary of War for a term of five years from the date of the expiration of the term of the member whom he succeeds, except that any successor appointed to fill a vacancy occurring prior to the expiration of a term shall be appointed only for the unexpired term of the member whom he succeeds. A vacancy in the board shall not impair the powers of the remaining members to execute the functions of the board.

(b) The members shall receive no salary for their services on the board but, under regulations and in amounts prescribed by the Secretary of War, may be paid by the corporation a reasonable per diem compensation for attending meetings of the board and for time spent on special service of the corporation, and their traveling expenses to and from such meetings, or when assigned to such special service.

(As amended by Pub. No. 663, 69th Congress)

"(c) In addition to the six members, the Secretary of War shall appoint an individual from civil life, or (notwithstanding section 1222 of the Revised Statutes or any other provision of law, or any rules and regulations issued thereunder) detail an officer from the Military Establishment of the United States, as chairman of the board. Any officer so detailed at the date of the passage of this amendatory Act shall, during his term of office as chairman, have the rank, pay, and allowances of a major general, United States Army, and shall be exempt from the operation of any provision of law or any rules or regulations issued thereunder which limits the length of such detail or compels him to perform duty with troops. Any individual appointed from civil life shall, during his term of office as chairman, receive a salary not to exceed $10,000 a year, to be fixed by the Secretary of War. The Secretary of War may delegate to the chairman any of the functions vested in the Secretary by this Act."

(d) The board shall meet for organization purposes when and where called by the Secretary of War, and thereafter at such times and places as the Secretary deems necessary. The board shall consider matters submitted to it by the Secretary of War, and make recommendations thereon, and from time to time advise him and make recommendations, in respect of the management and operation of existing facilities, or the development and operation of new lines.

SEC. 5. The corporation—

(a) Shall have succession in its corporate name during its existence;

(b) May sue and be sued in its corporate name;

(c) May adopt a corporate seal, which shall be judicially noticed, and may alter it at pleasure;

(d) May make contracts;

(e) May acquire, hold, and dispose of property;

(f) May appoint, fix the compensation of, and remove such officers, employees, attorneys, and agents as are necessary for the transaction of the business of the corporation; define their duties, and require bonds of them, and fix the penalties thereof;

(g) May incur obligations, borrow money for temporary purposes, and issue notes or other evidence of indebtedness therefor, but the aggregate amount of the indebtedness at any time shall not exceed 25 per centum of the value of the assets at such time;

(h) May exercise any of the functions vested in the Secretary of War by sections 201 and 500 of the Transportation Act, 1920, as amended;

(i) May, in the exercise of such functions, conduct the business of a common carrier by water, and maintain, manage, and operate properties held for or used in the service of transportation, or necessary or convenient to such use; and

(j) In addition to the powers specifically granted, shall have such powers as may be necessary or incidental to fulfill the purposes of its creation.

SEC. 6. (a) The Secretary of War shall transfer to the corporation all assets transferred to, or acquired, constructed, or operated by, or under the direction of, the Secretary of War, or which revert to the United States, under section 201 of the Transportation Act, 1920, as amended, or under the joint resolution entitled "Joint resolution to exempt the New York State Barge Canal from the provisions of section 201 of the Transportation Act, 1920, and for other purposes," approved February 27, 1921.

(b) The rights, privileges, and powers, and the duties and liabilities, of the Secretary of War, or the inland and coastwise waterways service, in respect of any contract, loan, lease, account, or other obligation, under section 201 of such Act, or under such joint resolution, shall become the rights, privileges and powers, and the duties and liabilities, respectively, of the corporation.

(c) All money available for expenditure or the making of loans under such joint resolution or section 201 of such Act, and all money repaid in pursuance of loans made under subdivision (c) of section 201 of such Act, shall be avail-

able for expenditure or the making of loans by the Corporation under this Act.

(d) The enforcible claims of or against the Secretary of War, or the Inland and Coastwise Waterways Service, in respect of the operation, construction, or acquisition of any such transportation facilities, shall become the claims of or against, and may be enforced by or against, the corporation.

(e) The Secretary of War shall adjust and appraise the value, at the time of transfer, of all assets transferred to the corporation under this Act, and such value shall be entered upon the books of the corporation.

(f) In the determination of the running of the statute of limitations or of any prescriptive right, the period of time shall be computed in the same manner as though this Act had not been passed.

APPENDIX B.

U. S. Code, Title 49, Sec. 15 (7).

Section 15. (7)*Commission to determine lawfulness new rates; suspension, refunds.*—Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be

proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portions of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after June 18, 1910, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it, and decide the same as speedily as possible.

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 422

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., appellants

v.

ILLINOIS CENTRAL RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 122), Judge Nields' concurring opinion (R. 126), and Judge Dickinson's dissenting opinion (R. 127), are reported in 3 F. Supp. 1005. The report of the Interstate Commerce Commission is reported in 190 I.C.C. 177.

JURISDICTION

The final decree of the District Court was entered June 26, 1933 (R. 129). Petition for appeal

was filed August 9, 1933, and was allowed the same day (R. 131, 133).

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U.S.C., Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U.S.C., Title 28, Sec. 345).

QUESTIONS PRESENTED

1. Whether the provision in Section 3 (e) of the Inland Waterways Corporation Act, as amended, for a hearing subsequent to an order of the Interstate Commerce Commission tentatively establishing minimum differentials between all-rail and joint-rail and water rates is contrary to the Constitution of the United States.

2. Whether the failure of appellees to file a complaint and to demand a hearing as to the reasonableness of the through routes, joint rates, and minimum differentials prescribed in the order of the Commission, was a failure to exhaust the administrative remedies afforded to appellees by the statute so as to make the bringing of this suit premature.

3. Whether the order of the Interstate Commerce Commission, requiring appellees to join with the Barge Line in establishing minimum differentials between all-rail and joint rail and water rates, affects any substantial legal interest of appellees sufficient to constitute a basis for this suit.

STATUTE INVOLVED

The pertinent portion of Section 3 (e) of the Inland Waterways Corporation Act, as amended, is printed in the Appendix pp. 51–52, *infra*.

STATEMENT

Appellees brought this suit under the Urgent Deficiencies Act of October 22, 1913, to enjoin, annul and set aside an order issued December 10, 1932, by the Interstate Commerce Commission pursuant to the provisions of the Inland Waterways Corporation Act, as amended, in a proceeding entitled *Application of American Barge Line Company,* 190 I.C.C. 177 (R. 22). The order directs certain rail carriers, including appellees, to join with the American Barge Line in establishing minimum differentials between all-rail and joint rail and water rates on cotton in carloads, over barge-rail and rail-barge-rail routes previously prescribed by the Commission, from Memphis, Tennessee, and from certain points in Arkansas to destinations in eastern territory, including points in Pennsylvania, New York, New Jersey, and southern New England.

The Act, as amended, provides in Sec. 3 (e) that any firm or corporation engaged or about to engage in conducting a common-carrier service upon either the Warrior or the Mississippi river, or its tributaries may apply to the Commission and "obtain a certificate of public convenience and necessity" to conduct such service; that the Commis-

sion "shall *thereupon,* by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices * * * " (italics ours); that the Commission "shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the commission." It is further provided that any interested carrier who feels aggrieved because of the through routes or joint rates required by such order may file a complaint with the Commission, and the latter is authorized "at once, and if it so orders without answer or other formal pleading * * * ", to enter upon a hearing concerning—

> (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this Act; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. * * *

At any such hearing the burden of proof rests upon the carrier or carriers making the complaint; and the Commission "shall give the hearing and

decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible."

Pursuant to these provisions, the Barge Line filed with the Commission its application on March 20, 1931, for a certificate of public convenience and necessity covering waterway operations on the Mississippi and Ohio rivers between New Orleans and Pittsburgh, and for the establishment of through barge-rail and rail-barge-rail rates in connection with such river transportation via specified ports of interchange (R. 32, 33). Copies of the application were sent by the Commission to the Governors and public service commissions of the States bordering on the water route, to interested rail carriers, and to competing water carriers, in the form and manner prescribed by the statute (R. 33). In a sworn return to a questionnaire from the Commission, the Barge Line submitted data in support of the application (R. 33). Neither the State authorities nor the competing water lines offered any objection to the application, but comments in general opposition thereto were filed by rail carriers in official and southwestern territories (R. 33). Hearing on the application was had solely on the question of whether the Barge Line was entitled to the certificate sought, and interested rail carriers appeared at the hearing, or by brief, in opposition to the granting of the certificate (R. 33).

On March 11, 1932, the Commission entered its report and decision (R. 32; 182 I.C.C. 521), granting the certificate and prescribing through routes and joint rates on certain classes of traffic and certain commodities between the points named in its certificate and order (R. 43–47). The joint rail and water rates prescribed by the Commission were fixed upon the basis of differentials[1] 20 percent and 10 percent lower than the lowest all-rail rates in effect on corresponding traffic between the same points.

By its supplemental order in the same proceeding, the Commission later enlarged the territorial application of such joint rates so as to extend their application to certain interior points in the southwest. The same differentials, however, were preserved in these additional joint rates (R. 48; 185 I.C.C. 483).

After the rail and water rates prescribed by these two orders were published, the southwestern rail-

[1] These differentials, in general, were based upon the extent to which the shortest all-rail distance between points of origin and destination via the port or ports of interchange exceeded the shortest all-rail distance directly between such points of origin and destination. Among other factors or limitations which were considered, where such excess was not more than 20 percent, the 20-percent differential was applied; where the excess was more than 20 percent, the 10-percent differential obtained. However, if the excess was more than 40 percent, in the case of barge-rail routes, or more than 33⅓ percent, in the case of rail-barge-rail routes, no through rail and water routes at all were allowed. (Findings 2–3, R. 39–41.)

roads published in September 1932 all-rail carload rates on cotton which were considerably lower than the all-rail any-quantity rates that had previously been in effect. These new all-rail rates were established because of competition from unregulated truck and water carriers, and were to expire on July 31, 1933 [a]. In November 1932 the new carload rates were further reduced on the ground that originally they had not been made low enough to accomplish their purpose. (R. 18.) The railroads then refused to join with the Barge Line in the joint water and rail rates, which were differentially lower than the reduced rail rates, claiming that establishment of the latter was compelled by strong competition (R. 18).

The Barge Line thereupon filed, on November 2, 1932, and November 7, 1932, petitions with the Commission seeking supplemental orders requiring the establishment of rail-barge-rail rates from all points in Arkansas and barge-rail rates from Memphis to all points in Pennsylvania, New York, New Jersey, and southern New England, applicable via its line between Memphis and Pittsburgh, and based on differentials computed from the carload rail rates (R. 18, 82–85, 86–87). The rail carriers filed written responses, statements, and arguments in opposition to the application, and urged that no action be taken until after a hearing had been held and evidence submitted concerning the rate situation involved (R. 18–19, 87–115).

[a] The railroads have extended the expiration date of these rates to July 1, 1934.

The Commission, adhering to its previous construction of the Denison Act (148 I.C.C. 129), refused to grant a hearing prior to the issuance of its order. After considering the written data before it from both the Barge Line and the rail carriers, it entered an order requiring the railroads to join with the Barge Line in publishing rail-barge-rail rates on cotton in carloads 8 cents lower than the rail rates when carload minimum weight is 25,000 to 40,000 pounds; 6 cents when such minimum is 35,000 to 55,000 pounds; and 4 cents when the minimum is 50,000 to 80,000 pounds.[2] The order further prescribes barge-rail rates from Memphis to eastern destinations 6 cents lower than the rail rates where the carload minimum weight is 37,500 pounds. (R. 22–24.)

This was the so-called second supplemental order which is attacked in this suit. It was issued December 10, 1932, and was to become effective on January 25, 1933 (R. 22–23). After its issuance the railroads filed petitions requesting the Commission to postpone the effective date of the order (R. 111); and to vacate the order, reopen the proceedings, and conduct hearings concerning the reasonableness of the differentials prescribed therein (R. 113–116). The Commission extended the effec-

[2] The Barge Line had asked for differentials on corresponding carload weights of 11, 10, and 9 cents, respectively, for rail-barge-rail rates; and for a 10-cent differential for barge-rail rates (R. 83, 18).

tive date to February 21, 1933,[3] but denied the petition to vacate the order and to enter upon such hearings (R. 49–50). Its order denying the petitions stated:

> That the action herein is without prejudice to respondents' right to a summary hearing concerning the reasonableness of the through routes, joint rates, and minimum differentials prescribed in the order of March 11, 1932, in said proceeding, as amended by said order of December 10, 1932, upon complaint filed as authorized by the Inland Waterways Corporation Act.

Without filing a complaint with the Commission to test the reasonableness of the through routes, joint rates, or minimum differentials ordered, as provided by the Act, the carriers filed this suit (R. 3–24) in the specially constituted District Court, asking that the second supplemental order be enjoined and set aside.

The pleadings, including those of the several water carriers which intervened in defense of the order,[4] raised substantially the following issues:

1. Whether the Commission properly construed Sec. 3 (e) of the Inland Waterways Corporation Act, and acted in accordance with the purpose and procedure of that section.

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[3] The effective date of the order was subsequently extended to April 22, 1933 (R. 25), and lated to June 1, 1933 (R. 119).

[4] The Inland Waterways Corporation, the American Barge Line Company, and the Mississippi Valley Barge Company.

2. Whether plaintiffs had alleged or proved that the enforcement of the order had caused or would have caused any injury of which the law takes cognizance so as to constitute a deprivation of legal rights.

3. Whether the statute, as construed, is within the power of Congress and violates any constitutional provision or guaranty.

4. Whether appellees brought this suit prematurely in view of the fact that they have failed to request the hearing provided in the Act, and thus may not have exhausted the administrative remedies afforded.

The District Court filed on June 14, 1933, its findings of fact (R. 117), conclusions of law (R. 120), and opinion (R. 122); and also a concurring opinion (R. 126) and a dissent (R. 127). The court held that the Act was unconstitutional because it empowered the Commission to fix rates before conducting a full hearing, and that the provision of the Act for hearing, upon complaint of any aggrieved railroad, after the rates had been prescribed "is not the hearing guaranteed by the Constitution" (R. 127). Each of the judges agreed that the Commission had properly interpreted the Act in holding that it did not require a hearing prior to establishing the joint rates and differentials. None of them passed upon the contention made that plaintiffs were prematurely in court. Only Dickinson, D.J., dissenting, recognized the

issue as to the extent of legal injury suffered by the rail carriers. His opinion (R. 127) rests upon the ground, urged by defendants at the trial, that "constitutionality turns upon the question of a deprivation of property without compensation or otherwise without due process" (R. 129), and that, inasmuch as the railroads conceded at the trial that they had no legal or property right in "prospective traffic" which might be diverted to some extent from their rails to the Barge Line, the bill should be dismissed for lack of sufficient legal interest to maintain the suit.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In deciding that Section 3 (e) of the Inland Waterways Corporation Act, as amended on May 29, 1928, c. 891, 45 Stat. 978 (U.S.C. Sup. VI, Title 49, Chap. 5, Sec. 153 (e)), to the extent that said section authorizes the Interstate Commerce Commission to establish minimum differentials between joint rail and water rates without prior hearing or evidence, constitutes a delegation of pure legislative authority contrary to the provisions of Article I, Section 1, of the Constitution of the United States.

(2) In deciding that Section 3 (e) of the Inland Waterways Corporation Act, as amended, to the extent that it authorizes the entry of an order and compels compliance therewith, without prior hearing, denies to the parties the right to a judicial review of such order and is arbitrary and unreason-

able and in violation of the Fifth Amendment of the Constitution of the United States.

(3) In deciding that the action of the Interstate Commerce Commission, in denying petitions of plaintiffs below for a hearing and in requiring minimum differentials between joint rail and water rates to be established without such a hearing or opportunity to be heard, constituted a denial of due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

(4) In deciding that the provision in said Section 3 (e) requiring the Interstate Commerce Commission to proceed to a hearing subsequent to its order upon the filing of a complaint by an aggrieved carrier was in violation of the Fifth Amendment of the Constitution of the United States.

(5) In failing to consider and to decide that the plaintiffs below had not exhausted their administrative remedies and that they were for that reason not entitled to the granting of the relief which they sought by their bill.

(6) In refusing to hold that no legal rights of the plaintiffs below are affected or threatened by the said order of the Interstate Commerce Commission; or that plaintiffs below failed to allege and prove that any such rights are so affected or threatened.

(7) In entering a decree setting aside the order of the Interstate Commerce Commission and enjoining the enforcement of said order.

(8) In refusing to dismiss the bill of complaint.

SUMMARY OF ARGUMENT

I

Section 3 (e) of the Inland Waterways Corporation Act, as amended, empowers the Commission to issue an order establishing minimum differentials between all-rail and joint rail and water rates without a prior hearing, but directs that, upon complaint being made by a carrier following such an order, the Commission shall enter upon full, expedited hearings concerning the reasonableness of *such differentials.*

Due process of law does not require a hearing in advance of an administrative order, provided opportunity to be heard is afforded prior to the enforcement of such order. *Home Telephone Co.* v. *Los Angeles,* 211 U.S. 265, 278; *Crane* v. *Hahlo,* 258 U.S. 142, 147; *Dayton-Goose Creek Railway Co.* v. *United States,* 263 U.S. 456, 485–486. The order in question is not final; it is merely tentative. The Commission is empowered to grant a stay pending final decision as to the reasonableness of the order. Secs. 15 (7) and 16 (6) of the Interstate Commerce Act. Heretofore, it has suspended orders under the Barge Line Act pending subsequent hearing in several cases (163 I.C.C. 716; 167 I.C.C. 710; 183 I.C.C. 33), and in this very case the Commission has actually so successively extended the effective date of this order that it has never become operative. Due process is thus afforded. *Porter* v. *Investors' Syndicate,* 286 U.S. 461, 470–471.

The order is not conclusive upon appellees; it can only be enforced through the medium of the courts. Appellees would have full opportunity, in the event suit for enforcement were instituted at the instance of the Commission, to raise all defenses, both as to the validity of the Act and the manner of its administration. *Baer Bros. Mercantile Company* v. *Denver & Rio Grande Ry. Co.*, 233 U.S. 479; *Columbia Ry. etc. Co.* v. *Blease*, 42 F. (2d) 463 (E.D.S.C.); *Wells, Fargo and Co.* v. *Nevada*, 248 U.S. 165. *Missouri Pacific Ry. Co.* v. *Tucker*, 230 U.S. 340, *distinguished*.

Appellees contend that the power to fix rates without a prior hearing constitutes an unwarranted delegation of legislative authority. This merely assimilates the requirements of Art. I, sec. 1, to those of the Fifth Amendment and is unworthy of independent consideration.

The provision in the Act shifting the burden of proof to the carriers complaining against the reasonableness of the summary order does not violate due process. *New England Divisions Case*, 261 U.S. 184, 199; *Minneapolis & St. Louis R.R. Co.* v. *Railroad and Warehouse Commission*, 193 U.S. 53.

II

In failing to comply with the procedure provided by the statute by filing a complaint with the Commission following the issuance of its order,

which would have enabled the institution of hearings concerning the reasonableness of the order, appellees have failed to exhaust the administrative remedies afforded by the Act. *Porter* v. *Investors' Syndicate,* 286 U.S. 461; *White* v. *Johnson,* 282 U.S. 367, 373; *Vandalia Railroad Company* v. *Public Service Commission,* 242 U.S. 255. Wherever it is the clearly expressed intention of the legislature that further administrative steps shall be taken, courts of equity will not interfere. *Columbia Ry., etc., Co.* v. *Blease,* 42 F. (2d) 463 (E.D. S.C.), distinguishing *Prendergast* v. *New York Telephone Company,* 262 U.S. 43. Appellees have attempted to ignore the Commission entirely. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426.

III

A suit brought under the Urgent Deficiencies Act, as amended, to set aside an order of the Interstate Commerce Commission requires both allegation and proof that the order violates or threatens some legal interest of the plaintiffs. *Moffat Tunnel League et al.* v. *United States,* 289 U.S. 113, 119; *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U.S. 479, 486; *Sprunt & Sons, Inc.,* v. *United States,* 281 U.S. 249.

Appellees (plaintiffs below) do not allege or prove confiscation. *Louisville & Nashville R.R. Co.* v. *Garrett,* 231 U.S. 298, 315. (For that matter,

they could not be heard to say that the minimum differentials established by the order are unreasonable, for they were computed from all rail rates voluntarily published by the appellees.)

The sole basis of the suit, as indicated by the bill of complaint, is that the Barge Line may be enabled, by virtue of the order, to capture a part of the traffic which would otherwise be transported by appellees. Appellees have no legal right to prospective traffic or even to recapture traffic which they originated. *Sprunt & Sons, Inc.* v. *United States*, 281 U.S. 249; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 279 U.S. 768, 780. The declared policy of Congress in the enactment of the Transportation Act of 1920 and the Inland Waterways Corporation Act denies to any carrier a legal right to traffic in any particular community. *Texas & Pacific Ry. Co.* v. *Gulf, etc., Ry. Co.*, 270 U.S. 266; *Indian Valley R.R. Co.* v. *United States*, 52 F. (2d) 485, 487 (N.D. Calif.).

ARGUMENT

I

THE HEARING PROVIDED IN THE ACT IS A SUFFICIENT GUARANTY OF THE CONSTITUTIONAL RIGHTS OF THE PARTIES

1. The construction placed on the Act by the Commission not to require a prior hearing was proper

That portion of Section 3 (e) of the Inland Waterways Corporation Act which is relevant here

provides that any person, firm, or corporation, engaged or about to engage in constructing a common carrier service upon the Mississippi River or any tributaries thereof, may apply to the Commission and obtain a certificate of public convenience and necessity—

> in accordance with the provisions of section 1 of the Interstate Commerce Act, as amended, and the Interstate Commerce Commission shall *thereupon,* by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the Commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of pub-

lication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. *The commission is hereby given authority upon complaint, at once,* and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, *to enter upon a hearing* concerning (1) the reasonableness or lawfulness of any through route or joint rate filed *pursuant to* such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates *ordered* by the commission under the provisions of this Act; and after *full hearings* the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: * * * (Italics ours.)

The statutory scheme is plain on its face, and clearly contemplates the summary issuance of an order directing the connecting carriers to join in through routes and joint rates. No hearing prior to the issuance of such order is to be held, but the Commission is directed thereafter to conduct "full hearings" concerning the reasonableness or lawfulness of any through route or joint rate "filed pursuant to its order." This is the construction which was adopted by the Commission in the present case, and it is consistent with the view which the Commission has constantly taken since the enactment. *Procedure under Barge Line Act,* 148 I.C.C 129; *Through Routes and Joint Rates,* 153 I.C.C. 129; *Application of Mississippi Valley Barge Line Co.,* 167 I.C.C. 41; *Through Routes and Joint Rates,* 172 I.C.C. 525; *Application of Mississippi Barge Line Co.,* 178 I.C.C. 224. In the first proceeding, at p. 138, it said:

> In our opinion the only rational interpretation of the above-quoted provision is that it is an attempt to substitute for hearings prior to our orders establishing through routes and joint rates, fixing minimum differentials, and prescribing equitable divisions, subsequent hearings upon complaint.

As was pointed out in the opinion below (R. 124), this interpretation flows not only from the unambiguous language of the statute, but from the explanatory remarks of the majority report of the House committee as well. House Rept. No. 1537,

70th Cong., 1st Sess., pp. 5, 6.[5] Moreover, it may be said in passing that an examination of the background of the statute will serve not only to corroborate such an interpretation of its meaning, but will reveal, in addition, the extent of the sentiment which was aroused in Congress against the non-cooperative attitude of rail carriers generally toward the sharing of the country's traffic with carriers by water. As the House Report (p. 5), observes:

> Unless such opposition on the part of the rail carriers is overcome and through routes, joint rates, and an equitable division of joint rates is made available without interminable delays and the heavy expenses necessary to carry on such proceedings before the Interstate Commerce Commission, privately owned transportation service will never be realized on the inland waterways of the country.
>
> The hearings on this bill convinced the committee that legislation somewhat drastic is now not only needed but is necessary in order to fully carry out the purposes for creating the Inland Waterways Corporation, and to realize the benefits of the policy of Congress manifested by the large expenditures made for the improvement of our inland waterways.

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[5] The Senate Report (Rept. No. 1273, 70th Cong., 1st sess., p. 4) quotes from the House Report on this part of the bill and contains nothing inconsistent with what was said in the latter.

It would not appear to require a more extended showing, therefore, that the statute was properly construed by the Commission not to require a hearing in advance of the order in question. In addition to the clarity of the language of the statute, the consistent interpretation made by the tribunal charged with its administration (*United States* v. *Hammers,* 221 U.S. 220, 228) and the tenor of the legislative committee reports preceding its enactment (*Phillips* v. *Commissioner,* 283 U.S. 589, 594) can leave little doubt that such a construction was proper.

(2) Due process of law does not require a hearing in advance of an administrative order

The emphasis of the authorities, relative to the requirements of due process of law, strikes at the failure to provide for opportunity for hearing before final adjudication, and is not concerned with the particular moment at which a hearing shall be accorded. It is settled that rates prescribed by the Interstate Commerce Commission may not be enforced until after the parties have been heard. The constitutional right to a hearing, however, embraces no right to any particular procedure, *Crane* v. *Hahlo,* 258 U.S. 142, 147; or to a hearing at any given stage of the proceedings.

In *Home Telephone Co.* v. *Los Angeles,* 211 U.S. 265, an ordinance permitted the city council to fix rates without a hearing, and this Court, considering the alleged violation of the due process clause, said (p. 278):

> The appellant also contends that the ordinances fixing rates are wanting in due process of law * * * because the section (31) of the charter * * * does not expressly provide for notice and hearing *before action.* But rate regulation is purely a legislative function and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings and, for peculiar reasons, in some forms of taxation (see *Londoner* v. *Denver,* 210 U.S. 373) would not seem to be indispensable. (Italics ours.)

In one form or another, the issue as to the requisite time for the hearing has been frequently raised and it has been determined that so long as a hearing is had at some stage preceding enforcement, due process of law exists. It is a familiar incident in cases involving the taxing power. *Phillips* v. *Commissioner,* 283 U.S. 589, 596–597; *Graham* v. *DuPont,* 262 U.S. 234, 255; *Dodge* v. *Osborn,* 240 U.S. 118, 120; *Hagar* v. *Reclamation District,* 111 U.S. 701, 708; *Wells, Fargo & Company* v. *Nevada,* 248 U.S. 165, 168; the Court saying, in *Paulsen* v. *Portland,* 149 U.S. 30, at p. 41;

> It is settled that, if provision is made "for notice to and hearing of each proprietor, *at some stage of the proceedings,* upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." *McMillen* v. *Anderson,* 95 U.S. 37; *Davidson*

v. *New Orleans,* 96 U.S. 97; *Hagar* v. *Reclamation District,* 111 U.S. 701; *Spencer* v. *Merchant,* 125 U.S. 345. (Italics ours.)

Similarly, it appears in condemnation proceedings. *Bragg* v. *Weaver,* 251 U.S. 57, 60–61; *North Laramie Land Co.* v. *Hoffman,* 268 U.S. 276. In *Bradley* v. *City of Richmond,* 227 U.S. 477, a classification made without a hearing in a license fee case was declared valid when there was a chance to be heard after the classification was made.

The Interstate Commerce Commission is permitted, in at least one instance, to issue orders without any hearing at all. *Avent* v. *United States,* 266 U.S. 127, sustaining the emergency car orders under the authority of Sec. 1 (15) of the Interstate Commerce Act.

It has even been held, as to hearings before judicial tribunals, that "due process requires that there be an opportunity to present every available defense; but it need not be before the entry of the judgment." *American Surety Company* v. *Baldwin,* 287 U.S. 156, 168; *Grant Timber & Mfg. Co.* v. *Gray,* 236 U.S. 133; and *Bianchi* v. *Morales,* 262 U.S. 170.

No decision has been found,[6] either in situations like those just mentioned or in any other, in which

[6] The decision in *Southern Railway Company* v. *Virginia,* No. 26 on the current docket, decided on December 4, 1933, has also been examined. The statute in that case made provision for no hearing at all, at any stage of the proceedings, as to the determination by the State Highway Commissioner that "public safety and convenience" required the elimina-

a hearing in *advance* of the administrative order has been required.[7]

The decisions have been directed, not against the failure to provide for prior hearings but against the failure to provide for any hearings at all, whether before the administrative body or with the court on review. As to the latter, this Court, in *Dayton-Goose Creek Railway* v. *United States*, 263 U.S. 456, at pp. 485–486, said:

> It is further objected that no opportunity is given under § 15a for a judicial hearing as to whether the return fixed is a fair return. The steps prescribed in the act constitute a direct and indirect legislative fixing of rates. No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for such an in-

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tion of grade crossings, and made the administrative determination of that issue both final and conclusive upon the carriers, except in the event of "arbitrary" exercise of the power. None of these objections may properly be urged here. Had the issue before the Court in that case been the validity of the provision for a subsequent hearing on the plans and specifications required for proposed overhead crossings, a problem somewhat analogous to that now before the Court would have been raised.

[7] It is significant of this fact that all of the cases cited by plaintiffs below to sustain the proposition that a prior hearing is essential are concerned with statutes expressly requiring such a hearing. In none of these instances was the present precise issue (i.e., as to the validity of a statute which merely deferred the hearing until after the issuance of a tentative order) before the Court.

quiry exists under §§ 208 and 211 of the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution. *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U.S. 287.

The only essential thing, therefore, is that the administrative order must not be *final* or *conclusive* upon the parties. *Chicago, etc., Railway Company* v. *Minnesota,* 134 U.S. 418. That the order in this case does not so offend in either of these respects will be made immediately to appear.

(3) The order is not final or conclusive and is not a denial of due process of law

The summary order which the Commission in Sec. 3 (e) is directed to issue was never intended by Congress to be a final finding against the carriers. It is plain from the procedure ordained that the order is provisional in character. The rights of the parties are only tentatively fixed; they become finally fixed in the event the provision for a hearing is not invoked by the filing of a complaint. (It is submitted, however, that while appellees apparently are concerned over the possibility of a denial of a hearing with respect to the level of the rates to be charged, their contention, in effect, is to avoid the establishment of any joint rates at all—except possibly rates so high that traffic will not be diverted from the railroads to the rail-barge service, a position directly in conflict with the pol-

icy of Congress as set forth in Section 500[8] of the Transportation Act of 1920. Had appellees sought merely for a hearing with respect to the reasonableness of the rates, then they would have availed themselves of the express provisions of the statute.)

Rates under the order are thus merely presumptively valid, and Congress may, consistently with the due-process clause, create rebuttable presumptions. *Mobile, Jackson & Kansas City R.R. Co.* v. *Turnipseed,* 219 U.S. 35; *New England Divisions Case,* 261 U.S. 184, 199.

Appellees could not be compelled to obey the order except by court decree. Orders of the Interstate Commerce Commission are not judgments, even after full hearing; the Commission is not a court, and has no power or process at its command for the enforcement of its orders or regulations. *Baer Bros. Mercantile Company* v. *Denver & Rio Grande Ry. Co.,* 233 U.S. 479; *Gulf, M. & N. Ry. Co.* v. *Merchants' Specialty Co.;* 50 F. (2d) 21 (C.C.A. 5th).

In *Columbia Ry. Gas and Electric Company* v. *Blease,* 42 F. (2d) 463, (E.D.S.C.), the company sought to secure a decree from the Federal district court setting aside an order of a state public service

[8] "It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." (c. 91, 41 Stat. 499.)

commission. After observing that the suit had been prematurely brought for failure to exhaust the administrative remedies provided in the statute, the court said (p. 466):

> In addition to this, there is grave doubt in my mind as to whether the plaintiff has shown that any irreparable injury will result from a refusal to issue the restraining order. It would appear from the statutes cited that, in case of a refusal to obey the order, the only remedies for its enforcement are a penalty of $500 (section 4819, Code of South Carolina, 1922, vol. 3) and by mandamus and contempt proceedings (section 4888, ibid). *If these are the only remedies, the plaintiff could assert its rights in an action brought for the penalty and also in the action of mandamus, and there would be no necessity for a resort to equity and an injunction.* (Italics ours.)

Decisions like *Wells, Fargo & Co.* v. *Nevada*, 248 U.S. 165; *Bragg* v. *Weaver*, 251 U.S. 57; and the other cases cited in connection therewith on pp. 22–23, *supra*, are likewise relevant here as they equally deny the propriety of intervention of courts of equity where ultimate enforcement of the administrative order can only follow an opportunity for judicial inquiry into the constitutional bases of such order.

Apparently the only method by which the order in question can be enforced is by suit filed at the instance of the Commission under the Urgent De-

ficiencies Act, 38 Stat. 219; U.S. Code, Title 28, Sec. 41 (28); Secs. 43–47, inclusive. In that event, appellees would be provided their day in court, and opportunity would be afforded them to raise all questions of law by way of defense. They would be free either to neglect or to refuse to obey the order, unless and until the Government should obtain a decree from the special tribunal established for such suits. It is not at all clear, moreover, that penalties for disobedience of the Commission's order have been provided by the Act. While it is true that Section 3 (e), under examination, contains a reference [9] to Section 15 (3) of the Interstate Commerce Act, and that violations of said Section 15 (3) are punishable by penalties described in Section 16 (8) [10] of the Interstate Commerce Act, the fact that the orders of the Commission under said Section 15 (3) [11] are to be issued

[9] "and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, *as provided in paragraph (3) of section 15 of the Interstate Commerce Act*, as amended, * * *." (Italics ours.)

[10] "Any carrier, * * * who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this Act shall forfeit to the United States the sum of $5,000 for each offense. * * *"

[11] "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, *after full hearing* upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares or charges, applicable to the

only after full hearing, unlike the procedure in the section under consideration; would appear to make it highly doubtful that the penalties to be incurred for violation of the former section would be applicable in the present instance. In the absence of such penalties, at least one pivotal distinction exists between this case and decisions like *Missouri Pacific Ry. Co.* v. *Tucker,* 230 U.S. 340; *Chicago etc. Ry. Co.* v. *Minnesota,* 134 U.S. 418; *Ex parte Young,* 209 U.S. 123; *Wadley Southern Ry. Co.* v. *Georgia,* 235 U.S. 651, and similar cases involving the exaction of penalties for disobedience of administrative orders made without hearing and giving no real opportunity for judicial review.

In any event, due process of law is afforded if, coupled with the power to review its own action, an administrative agency is empowered to grant a stay until final decision. *Porter* v. *Investors' Syndicate,* 286 U.S. 461, 470–471. The Commission has specific power to permit suspensions, Secs. 15 (7) and 16 (6) of Interstate Commerce Act. Under those sections the Commission is empowered to modify or suspend for a period of seven months

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transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. * * *" (Italics ours.)

any rate or classification pending a hearing and decision. The power to grant suspensions, moreover, need not be specifically expressed in the statute. It may be implied from the power to grant a hearing. In *Columbia Ry. Gas and Electric Company* v. *Blease*, 42 F. (2d) 463 (E.D.S.C.), the state utility statute contained no provision for a supersedeas. In holding that an application for a rehearing was necessary as an exhaustion of the administrative remedy, the court, at p. 466, said:

> It has been suggested that the commission would have no power to grant a supersedeas pending the application before it for rehearing, *but I think it is implied in the power to grant a rehearing that the commission may suspend the order until the question of rehearing can be decided.* If, however, the commission should refuse to grant a rehearing or should refuse to grant a stay pending the rehearing, the plaintiff would be allowed to renew its motion for a restraining order upon such showing." (Italics ours.)

See also *Palermo Land & Water Company* v. *R.R. Commission of California*, 227 Fed. 708, 710 (N.D. Calif.).

Although the Commission, under the aforementioned sections of the statute, may refuse to grant a stay at its discretion, its attitude if and when confronted by this very situation might have been anticipated from Commissioner Brainerd's concurring opinion in *Ex parte* 94, *Procedure Under Barge Line Act*, 148 I.C.C. 129, 141:

I am in substantial accord with the construction placed upon those certain portions of section 2 (e)[12] of the act of May 29, 1928, considered in the report. However, I desire to state that I am of the opinion that in the event the commission should issue a certificate of public convenience and necessity to the Inland Waterways Corporation and enter an order without hearing, directing rail carriers to join with said water carrier in through routes and joint rates and fixing reasonable minimum differentials * * *, and later, before said rates become effective, a complaint is filed by some interested carrier * * * *it would then be our duty to hear said complaint and decide said matter before said rates become effective; that in the event such a hearing is not had and the matter disposed of before the effective date of said rates, it would be our further duty temporarily to suspend them until said matter is decided;* and in the event that we should find said routes, rates or differentials unreasonable, it would be our further duty to order them canceled and to prescribe and require to be published and filed in lieu thereof reasonable routes, rates and differentials. This procedure is necessary to com-

[12] Sec 2 of the so-called "Denison Act," the Act of May 29, 1928, c. 891, 45 Stat. 978, amends Sec. 3 (e) of the Inland Waterways Corporation Act of June 3, 1924, c. 243, 43 Stat. 360. Elsewhere in this brief, Sec. 2 (e) of the Denison Act is referred to as Sec. 3 (e) as it appears in the Inland Waterways Act, as amended.

> ply with the requirements of due process of law. *Ohio Valley Co.* v. *Ben Avon Borough*, 253 U.S. 287, 289. (Italics ours.)

This was likewise the expressed view of Commissioner Farrell (*Ibid.*) and nothing to the contrary appears in the opinions of the other members of the Commission who participated in that proceeding.

Thus, if a supersedeas is required in this case, it is reasonable to presume that the Commission would have granted it in accordance with the constitutional requirement. The order directed a filing and publication of the rates ten days before the effective date thereof, whereas the usual period is thirty days. Sections 6 (3) and 15 (2) of the Interstate Commerce Act. Ample opportunity, therefore, was afforded appellees to obtain a suspension of the rates before they were even originally to become effective. Under its Rule XIX, the Commission frequently grants such suspensions. *Investigation and Suspension Docket No. 3337*, 163 I.C.C. 716 (R. 78, 81); *I. & S. Docket No. 3411*, 167 I.C.C. 710; *I. & S. Docket No. 3399*, 183 I.C.C. 33; see also 194 I.C.C. 437. In each of these instances the stay was granted for a period of seven months, the same period as is provided for suspensions under Section 15 (7) of the Interstate Commerce Act. Our attention has been directed to only one instance in which the Commission has refused an application for a suspension of proposed joint rail and water rates under the Barge Line Act (*Suspension Mem-*

orandum No. 7812), and this under such exceptional circumstances as not to diminish the force of the rule that a clear administrative practice in the construction and application of administrative rules and regulations is frequently recognized. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315; *Fawcus Machine Co.* v. *United States,* 282 U.S. 375; *Interstate Commerce Commission* v. *N. Y., N. H. & H. R. Co.,* 287 U.S. 178.

Finally, the Commission has actually and successively extended the effective date of this very order so that the rates prescribed have never become operative since their promulgation. The first extension order was issued on January 18, 1933, two weeks prior to the filing of this suit, hence it cannot properly be contended that postponement of the present order was altogether for the purpose of allowing the court below to determine the application for a preliminary injunction without the necessity of a stay order pending the suit.

Before the court below, plaintiffs suggested that due process of law was further denied to them by virtue of the provision in Section 3 (e) of the Act imposing the burden of proof upon the carrier or carriers who should file complaint against the reasonableness of the Commission's order. It is well settled, however, that Congress may, consistently with the due process clause, shift the burden of proof. *New England Divisions Case,* 261 U.S. 184.

199; *Minneapolis & St. Louis Railroad Co.* v. *Railroad and Warehouse Commission,* 193 U.S. 53.

(4) The statute is not unconstitutional as an unwarranted delegation of legislative authority

In delegating the power to the Commission to establish through routes, joint rates, and minimum differentials between rail and water rates, Congress directed that the same standard should be employed as is prescribed in the various delegations made to the Commission under the Interstate Commerce Act; namely, "reasonableness." Neither appellees nor the court below (R. 126) have denied the authority of Congress to delegate rate-making power to the Commission. They jointly assert that such power cannot be delegated unless accompanied by a statutory requirement that the Commission conduct a hearing *prior* to the issuance of a rate order, thus assimilating the requirements of Article I, Section 1, of the Constitution to those of the Fifth Amendment. This is saying no more than that the power itself may be delegated, but that if it is not employed in a proper manner, due process of law does not obtain. It having been revealed that there is no denial of the latter requirement in the provisions of the statute for a hearing before, instead of after, the issuance of the order in question, the proposition advanced by appellees is obviously entitled to no further consideration.

II

THE SUIT IS PREMATURE AND CANNOT BE MAINTAINED, BECAUSE APPELLEES HAVE NOT AVAILED THEMSELVES OF THE OPPORTUNITY FOR HEARING PROVIDED IN THE ACT

SECTION 3 (e) of the Act, as previously stated, authorized the Commission to issue its order prescribing through routes, joint rates, and minimum differentials between all rail rates and joint rates in connection with rail and water service. The interested carriers are then to establish equitable divisions of such joint rates, but failing agreement between them, the Commission is empowered to establish such division. The subsection then continues:

> The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed *pursuant to such order of the commission,* or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates *ordered by the commission* under the provisions of this Act; and after full hearings the commission may make

> such order with reference to any such matters as it may find to be proper and in the public interest * * * (Italics ours.)

As has been shown, the indubitable meaning of the statute is to permit the Commission to make its order establishing the through routes, joint rates, and minimum differentials without a prior hearing, and to give opportunity for the interested carriers, following such order, to object thereto. In the absence of the filing of such complaint, of course, the order would stand until further action of the Commission. On the other hand, once a complaint is filed, the statutory scheme contemplates an immediate expedited hearing into the reasonableness of the various items contained in the order.

Appellees have not filed a complaint with the Commission in accordance with the plan of the statute. They did request, after the order was issued, that it be vacated and a hearing held *prior* to the establishment of the routes and rates (R. 113). The Commission denied this request, without prejudice to appellees' right to file a complaint as provided in the Act (R. 49). In the court below the appellees contended that the Commission's order would necessarily become final before they could have the benefit of such hearing; that they would be deprived of their property during the period required for such hearing, because, they claim, the rates prescribed would already be in effect; and that they would be compelled to comply with them, without any recourse or remedy to re-

coup whatever losses, if any, they might incur during that period.

The weakness of appellees' position in this respect has already been revealed. (See pp. 25–33, *supra.*) Adequate opportunity is given to parties regarding themselves aggrieved by the order of the Commission to be heard upon the subject of its reasonableness in many cases even before the date on which it originally becomes effective, and, in any event, to obtain from the Commission a suspension of the order pending such hearings.

It is well settled that one who is aggrieved by virtue of the action of an administrative body cannot have access to the courts to review either the regularity of such action or the validity of the statutory authority from which it proceeds, unless and until the remedies afforded by the statute are fairly and exhaustively pursued. *Porter* v. *Investors' Syndicate*, 286 U.S. 461; *Vandalia Railroad Company* v. *Public Service Commission*, 242 U.S. 255; *Prentis* v. *Atlantic Coast Line*, 211 U.S. 210; *Palermo Land & Water Company* v. *Railroad Commission of California*, 227 Fed. 708 (N.D. Calif.); *Columbia Ry. etc. Co.* v. *Blease*, 42 F. (2d) 463 (E.D.S.C.).[13] It

[13] Leading decisions involving administrative action other than that of a public service commission are: *Cavanaugh* v. *Looney*, 248 U.S. 453, and *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276 (condemnation proceedings); *Bradley* v. *Richmond*, 227 U.S. 477, and *First National Bank of Albuquerque* v. *Albright*, 208 U.S. 548 (tax proceedings); *Gundling* v. *Chicago*, 177 U.S. 183 (license application); *Rock Island, Arkansas & Louisiana R.R. Co.* v. *United States*, 254 U.S. 141 (Commissioner of Internal Revenue).

is generally said that, so long as that portion of the statutory procedure which remains to be pursued by aggrieved persons is primarily legislative in character, the courts will not interfere. *Keller* v. *Potomac Electric Company*, 261 U.S. 428, *Prentis* v. *Atlantic Coast Line, supra.* Where, however, the legislative process is at an end, judicial interposition is proper. *Railroad & Warehouse Commission of Minnesota* v. *Duluth Street Ry. Co.*, 273 U.S. 625; see especially the opinion of the court below, 4 F. (2d) 543, 545 (D.C.Minn. 3d Div.). In the case at bar, it is clear that the plan of the Act embraces a more extended process than the issuance of a mere preliminary order, such as the one under present attack, laying down a schedule of joint differential rates for the temporary working guidance of the rail and water carriers, pending detailed hearings as to their reasonableness. The legislative rate-making functions of the Commission are by no means at an end with the issuance of such an order. Under the statutory scheme, they will have only just begun.

A striking analogy exists between the present situation and that in *Porter* v. *Investors' Syndicate, supra.* In that case, a Montana statute empowered the investment commissioner, upon his determination that an investment company was insolvent or was otherwise operating under conditions forbidden by the state Blue Sky Law, to revoke the company's permit to do business within

the state. It further provided that, within thirty days after such findings of the commissioner, an interested and dissatisfied person might bring suit in the state district courts to vacate and set aside such findings, and that—

> Pending any such action, the said findings * * * shall be prima facie evidence that they are just and reasonable and * * * shall remain in full force and effect. If no action be brought to set aside said findings or decision within thirty days, the same shall become final and binding. (Sec. 4038, c. 264, Revised Code of Montana, 1921, as amended by c. 194, session laws 1931.)

The Investors' Syndicate, having been threatened with loss of its permit as the result of the action of the commissioner under the statutory procedure, failed to bring suit in the state court within the requisite thirty days, but sought a decree from the Federal district court to enjoin any further action by the commissioner. The matter coming before this Court, on appeal from the decision of the court below granting the injunction, the contention of the commissioner that the appellee had failed to exhaust its administrative remedies was sustained and the decree reversed. The provisions of the statute for a review by the state court were construed to contemplate only a continuation of the "legislative process" involved in the revoca-

tion of permits, a process which must, under the authority of *Prentis* v. *Atlantic Coast Line, supra,* be complete before judicial intervention is proper. In the case at bar, the rule requiring exhaustion of administrative remedies before application to the courts for injunctive relief may be even more appropriately invoked, for the completion of the legislative process in the making of rates under the present statute rests in the hands of the administrative body itself, and not in those of a tribunal which is ordinarily concerned exclusively with matters of a judicial nature.

We are well aware of the numerous decisions of this Court and of inferior Federal courts in which injunctions have issued against orders of state public service commissions despite the objection raised that the complainants had not previously exhausted their administrative remedies. The leading case [11] in that connection is *Prendergast* v. *New York Telephone Company,* 262 U.S. 43, in which it was decided that, unless it clearly appears in the statute that further administrative procedure shall be pursued before resort to the courts may be taken, intervention by Federal equity courts is proper.

[11] Other decisions to the same effect are: *Railroad & Warehouse Commission of Minnesota* v. *Duluth Street Ry. Co.,* 273 U.S. 625; *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U.S. 39; *Banton* v. *Belt Line Ry. Corp.,* 268 U.S. 413; *Indiana General Service Company* v. *McCardle,* 1 F. Supp. 113 (S.D.Ind.); *International Ry. Co.* v. *Prendergast,* 52 F. (2d) 293 (W.D.N.Y.); and *Chicago Rys. Co.* v. *Illinois Commerce Commission,* 277 Fed. 970, 973–974 (N.D.Ill.).

Where, however, the statute plainly provides for such further administrative procedure, the *Prendergast* case itself intimates that the Federal courts will not interfere (see the opinion at p. 49); and the point has been definitely decided in *Columbia Ry. etc. Co.* v. *Blease*, 42 F. (2d) 463, 465–466 (E.D.S.C.). Nor is there anything to the contrary in *United States* v. *Abilene & Southern Ry. Co.*, 265 U.S. 274, even though that case involved the Interstate Commerce Commission and not a state agency. In holding that "Despite the failure to apply for a rehearing, the court had jurisdiction to entertain this suit" (p. 282), the opinion cites the *Prendergast* case, *supra*, but directs a comparison with the decision of a Federal district court in *Chicago Ry. Co.* v. *Illinois Commerce Commission*, 277 Fed. 970, 973–974 (N.D. Ill.). Undoubtedly, the pertinent language referred to is the following:

> If the state of Illinois, vesting the power to regulate rates in the Commerce Commission, had provided that the orders of the commission should not be put into effect until after a certain time, within which an application for a rehearing could be made, another question would be involved; * * *

Wherever, therefore, it is the clear intention of the legislature that further administrative steps shall be taken, it is evident that the courts will not interfere. The statute under present examination manifestly evidences such an intention in its detailed provisions for the institution of hearings by

the Commission upon complaint by an interested and dissatisfied carrier, following the issuance of the summary order. Moreover, in the *Prendergast* case and those in line therewith the only administrative procedure remaining unpursued by the aggrieved party was an application to the Commission for a rehearing. Here there has been no hearing at all. Appellees have not simply neglected to give the Commission an opportunity for *further* consideration of the manifold factors which may be injected into a hearing on the reasonableness of the through routes, joint rates, and minimum differentials prescribed in its order. Appellees seek to deny to the Commission any supervision whatsoever over such matters. The case, then, rests within the possible scope of the rule as expressed in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, holding simply that persons subject to regulation by a commission cannot ignore the existence of such a body and seek court relief in lieu thereof.

In one of its most recent expressions on this subject, this Court, in *White* v. *Johnson*, 282 U.S. 367, at p. 373, said:

> The constitutionality of a statute is not drawn into question except in connection with its application to some person, natural or artificial. We have above called attention to the provisions of the Radio Act which give redress against arbitrary or unjust action by the Commission. We repeat that the ap-

> pellant did not see fit to avail himself of the right of appeal thereby conferred, but on the contrary chose to violate the Commission's order and to stand on an alleged constitutional right which he says the action of the Commission infringed. It would be subversive of all established principles were courts, in litigations between parties, who have reciprocal rights under the Constitution, to settle their controversies *by broad statements to the effect that acts of Congress are unconstitutional upon their face;* and this not only in ignorance of the circumstances and manner of the application of the statute by the administrative body, but with knowledge that the party complaining had failed to pursue the remedy provided by law. (Italics ours.)

The principle revealed in that decision compels the dismissal of plaintiffs' suit on the ground that they have not availed themselves of the hearing expressly provided in the statute.

III

THE ORDER AFFECTS NO LEGAL INTEREST OF APPELLEES; HENCE, THEY ARE WITHOUT STANDING TO MAINTAIN THIS SUIT

A suit brought under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission, like any ordinary suit invoking the equity powers of the Federal courts, will be entertained only upon allegation and proof that the order violates or threatens to violate some legal in-

terest of the complainant. *Moffat Tunnel League* v. *United States,* 289 U.S. 113, 119; *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U.S. 479, 486; *Sprunt & Son, Inc.,* v. *United States,* 281 U.S. 249; *United States* v. *Los Angeles R.R.,* 273 U.S. 299, 313; *Delaware & Hudson Co.* v. *United States,* 266 U.S. 438; and *Edward Hines Trustees* v. *United States,* 263 U.S. 143, 148. This Court, in the decision last cited, said:

> But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened.

The allegations of the bill of complaint do not disclose any legal right or interest of the plaintiffs which is alleged to be violated by the order. Rather, the theory is either that the administrative procedure leading up to the making of the order was based on an unwarranted interpretation of the statute, or that the statute itself exceeded the prerogatives of Congress. In essence, no attack is made upon the order or its effect, but upon the authority by which it came into existence.

The relief sought is not based upon threatened confiscation, for the bill does not allege that the rates prescribed in the order are so low as to amount to a deprivation of plaintiffs' property The only allegations made concerning the sufficiency or legality of the rates from the standpoint

of their reasonableness for the transportation services to be rendered are that the designated rates are "improper, unlawful, unreasonable; are not fairly or reasonably related to all-rail rates on cotton"; that the rates "are unlawful and unreasonably low and will result in unlawfully diverting shipments of cotton from all-rail routes now participated in by these plaintiffs"; and that, if such rates be placed into operation, plaintiffs " will be deprived of revenue that would accrue to them because of the movement in cotton * * * in which these plaintiffs now participate and * * * did participate at all times herein mentioned " (R. 11–12). These are not allegations of confiscation, and could not serve as the basis for an attack upon the rates on that ground. It requires more than an assertion of loss of revenue to raise the issue of confiscation. The essential allegation is that the rates as fixed would not allow a fair return. *Louisville & Nashville R.R. Co.* v. *Garrett,* 231 U.S. 298, 315; *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U.S. 74, 88–89.

Little more can be said of the evidence presented by appellees in support of their bill. The record contains affidavits of five freight traffic officials (R. 60–72) in the employ of some of the rail carriers who bring this suit. Each affiant avers that the all-rail rates on cotton in carloads are "depressed rates" and that the establishment of the joint rail and water rates prescribed in the order will result

in loss of revenue to the railroads through diversion of traffic to the rail-barge routes. No showing is made that the joint rates prescribed are low enough to attract such traffic; that the relative cost of transportation between the two types of service is sufficiently the same as to warrant even an inference that a rate which is fair for one is equally fair for the other; or, in any case, that the action of the Commission, under its statutory duty to determine and establish equitable divisions of the rail-barge routes, would not have preserved to appellees substantially the same traffic return as accrued to them prior to the entry of the barge lines into the competition.

The sole basis of appellees' suit is the projected and speculative conclusion contained in the above-quoted allegations; namely, that the rates prescribed are so low that they will result in "unlawfully diverting shipments of cotton from all-rail routes" of plaintiffs. But it is obvious that they have no more legal right to retain an existing competitive advantage by preventing traffic from being diverted to competing carriers and other modes of transportation than have shippers to maintain existing competitive advantages. *Sprunt & Son, Inc.* v. *United States, supra; Hines Trustees* v. *United States, supra.* In *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 279 U.S. 768, at p. 780, it was said:

> There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originated.

It has been urged, however, that decisions of this Court, like *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U.S. 382; and *Western Pacific R.R. Co.* v. *Southern Pacific Co.,* 284 U.S. 47, 50–51, do sustain appellees' interest in prospective traffic so as to furnish them a legal basis for this suit. Those were cases brought under paragraph 20, Section 1, of the Transportation Act of 1920, and the inquiry in each instance was whether the petitioner was a "party in interest" within the meaning of that paragraph, which permits such a party to sue to enjoin a competing carrier undertaking an extension or construction of a new line of railroad without having first obtained from the Commission a certificate of public convenience and necessity. Such decisions are wholly irrelevant here, except insofar as they tend to prove the proposition—a very different one from that for which they were offered—that without such statutory consent no suit could have been brought, even in the instance so narrowly defined by the statute. There is certainly no unwritten law that gives to appellees the right to hold prospective traffic against the competition resulting from the Commission's authorization to the Barge Line to operate; and it is equally certain that the written law, Transportation Act of 1920, does not expressly or impliedly create such a right. Indeed, that Act negatives the existence of such right by its express provisions (Sec. 1 (18)), which confer upon the Commission—not the carriers—the power to pre-

vent harmful or wasteful competition, and to determine whether public, and not private, interest, requires or permits additional and competing carriers. (*Texas & Pacific Ry. Co.* v. *Gulf, etc. Ry. Co.*, 270 U.S. 266; *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U.S. 35; *Pennsylvania R. Co.* v. *United States*, 40 F. (2d) 921, 924–925 (W.D.Pa.); and *Indian Valley R.R. Co.* v. *United States*, 52 F. (2d) 485 (N.D.Calif.), in which it was said (p. 487):

> The operating, by a carrier, without competition, in any particular area is a privilege to be enjoyed as long as existing—but it is not a legal right, and therefore the plaintiff has shown nothing upon which to base an independent suit to vacate * * * the certificate and order of the commission.

The Commission's finding, under the authority of the Waterways Act, that "the present and future public convenience and necessity require operation of the American Barge Line as a common carrier" (R. 39) upon the Ohio and Mississippi rivers necessarily is a finding that public interest as a whole will be better served by the Barge Line operation, even if it does capture some of the traffic now hauled by the rail carriers. Thus, by enactment of both the Transportation Act and the Waterways Act, Congress has made the establishment of competing carriers by rail or water a matter of public rather than private interest, and in doing so has negatived the suggestion that any such carrier has

a constitutional, common law, or any other legal right to the traffic in a particular community.

It is submitted that, because of their failure to establish a legal injury, appellees are in no position to call into question the constitutionality of the statute. *Hines Trustees* v. *United States, supra.* Indeed, as observed by the dissenting opinion below (R. 128), "It is unnecessary to inquire into the validity of such a claim of right because the complainants have expressly disclaimed it and the majority opinion does not avow it." In any case, the absence of the right to maintain the suit is clearly revealed both in the record of this case and the previous decisions of this Court.

CONCLUSION

It is respectfully submitted that the order of the Commission was issued in conformity with the provisions of Section 3 (e) of the Inland Waterways Corporation Act, as amended; that neither the provisions of that Act nor the action of the Commission thereunder contravene any of the provisions of the Constitution of the United States; that appellees have not availed themselves of the administrative remedies afforded by the statute; that no legal rights of the appellees have been invaded or threatened; and that, therefore, the decree of the court below should be reversed.

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JANUARY 1934.

APPENDIX

Section 3 (e) of the Inland Waterways Corporation Act of June 3, 1924, c. 243, 43 Stat. 360, as amended by the Act of May 29, 1928, c. 891, sec. 2 (e) 45 Stat. 978 (U.S.C. Sup. VI, Title 49, Sec. 153 (e)), provides, *inter alia*:

> Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of the Interstate Commerce Act, as amended, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The commission shall further require the interested common carriers to enter into negotiations for

the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this Act; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: * * *

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 422

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

BRIEF ON BEHALF OF APPELLEES.

ELMER A. SMITH,
A. B. ENOCH,
M. G. ROBERTS,
W. A. COLE,
BRONSON JEWELL,
M. CARTER HALL,
JOHN F. CONNORS,
A. H. KISKADDON,
JAMES STILLWELL,
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I.

Section 3(e) as construed and administered by the Interstate Commerce Commission vests in that body the power to require these appellees to participate in rail and water routes without opportunity to be heard before the entry and enforcement of such an order, and therefore violates the Fifth Amendment to the Constitution of the United States in that it deprives these appellees of their property without due process of law.... 17

II.

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Illinois Cent. R. Co. v. United States, 3 F. Supp. 1005.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 422

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

BRIEF ON BEHALF OF APPELLEES.

OPENING STATEMENT.

The United States District Court for the District of Delaware by its final decree filed June 26, 1933, set aside and annulled an order of the Interstate Commerce Commission entered December 10, 1932, in the proceeding entitled *Ex Parte No. 102, Application of American Barge Line Company*, upon the grounds that said order was made without according to appellees, thirty-one common carriers by railroad subject to the Interstate Commerce Act, a full and fair hearing, and that Section 3(e) of the Inland Waterways Corporation Act of June

8, 1924, as amended, Section 153(e), Chapter 5, Title 49, United States Code Annotated (attached as an appendix hereto), in so far as it authorized the Commission to so make and enforce such order against appellees without such hearing, was unconstitutional in that it deprived appellees of their property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States, and constituted a delegation to the Commission of pure legislative power contrary to Article I, Sec. 1, of the Constitution of the United States. The opinion of the District Court appears in the record herein at pages 117-127, and is reported in 3 F. Sup. 1005.

The order of the Commission of December 10, 1932, so set aside and annulled by the court below was one requiring the common carrier railroad connections of the American Barge Line Company at Memphis, Tennessee, and Pittsburgh, Pennsylvania, to participate with that company in joint through rail-barge-rail and barge-rail rates and routes on cotton, in carloads, from points of origin in the State of Arkansas and from Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island and Connecticut, the water haul by barge in each case being on the Mississippi and Ohio Rivers from Memphis, Tennessee, to Pittsburgh, Pennsylvania.

The briefs on behalf of the principal appellants, the United States and the Interstate Commerce Commission, concede the constitutional requirement for a full and fair hearing before an order of the Interstate Commerce Commission fixing maximum rates is enforced against a carrier subject to the Interstate Commerce Act. The briefs of intervening appellants, American Barge Line Company, Mississippi Valley Barge Line Company,

Mississippi Valley Association, and Inland Waterways Corporation, substantially make the same concession.

All of the appellants, however, contend that appellees here and plaintiffs below might have secured a hearing before the Interstate Commerce Commission as to the reasonableness of the rates which they were required to establish prior to the enforcement of such rates, and, further, that said order of the Interstate Commerce Commission did not affect any substantial legal interest of appellees.

The contentions of appellants, however, are without foundation. Appellees pursued their statutory remedies to their ultimate conclusion and only sought the protecting aegis of a Federal court of equity when their last petition for vacation of the Commission's order and for a hearing had been denied and they were faced with either compliance with the Commission's order or incurring of the severe penalties prescribed by the Interstate Commerce Act.

Nor is there merit to the latter of the above contentions of appellants. The order of the Commission complained upon was one made in the exercise of the maximum rate making power of the Interstate Commerce Commission and directly and affirmatively required, the rail connections of the American Barge Line Company appellees before this court to participate in joint maximum rail-barge-rail and rail-barge rates. Appellees would be substantially damaged by this order, and it was of the character that this court has frequently announced, must be founded upon due process of law.

The pertinent facts bearing upon this controversy as found by the court below are as follows:

"1. Plaintiffs (appellees) are common carriers by railroad subject to the Interstate Commerce Act,

and engage in the transportation of cotton from points of origin in the State of Arkansas and from Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island and Connecticut.

"2. On August 29, 1932, plaintiffs and other railroad carriers, because of severe competition from unregulated truck and water carriers, established carload rates upon cotton from points of origin in the State of Arkansas and from Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, upon a basis substantially and materially lower than the any-quantity rates theretofore prevailing, and on November 16, 1932, plaintiffs and other railroad carriers further reduced said carload rates in the belief that such further reduction was necessary to meet the competition above referred to.

"3. By petitions dated October 31, 1932, and November 5, 1932, the American Barge Line Company applied to the Commission to enter an order requiring the railroads participating in the said carload cotton rates to participate with it in joint through rail-barge-rail and barge-rail carload rates from the same origins to the same destinations upon a basis lower than the all-rail carload rates. The natural and normal effect of such participation in through routes and rates with the American Barge Line Company would be to divert cotton, in carloads, from the all-rail routes previously established to the lower rail-barge-rail and barge-rail routes.

"4. By petitions dated November 12, 1932, and November 14, 1932, the carriers operating both east and west of the Mississippi River, including plain-

tiffs in this action, prayed the Commission to set down for hearing the said applications of the American Barge Line Company, and represented to the Commission in their said petitions that without a full and fair hearing, after reasonable notice, at which hearing carriers by railroad, including plaintiffs, shippers, and other parties in interest, and representatives of the American Barge Line Company, should be permitted to appear and offer testimony and examine and cross-examine witnesses offered by all parties in any respect interested therein, the Commission could not properly and justly determine the issues presented by such applications. The carriers by railroad further averred specifically that without such hearing the Commission would be without proper evidence to determine—

a. Whether carriers by railroad, including certain of these plaintiffs, should be required to join with the American Barge Line Company in establishing through rail-barge-rail rates and through barge-rail rates on cotton, in carloads, from Arkansas and Memphis, Tennessee, to the destination territory heretofore described;

b. Whether such through rail-barge-rail rates and barge-rail rates, or either of them, should be lower or the same as the through all-rail rates then in effect;

c. What through routes, if any, should be required;

d. What rail-barge-rail routes and barge-rail routes, if any, should be established; and

e. What differential, if any, should be maintained for the water-rail routes under the all-rail routes.

"5. In neither the petitions of the American

Barge Line Company, dated October 31, 1932, and November 5, 1932, nor in the petitions or replies of the carriers dated November 12, 1932, and November 14, 1932, are there set forth any facts or evidence necessary to a determination by the Commission of the issues presented by the applications of the American Barge Line Company. The petitions of the American Barge Line Company substantially set forth solely the ultimate conclusion that the establishment of rail and water rates there requested was desirable and in the public interest, and the petitions or replies of the carriers set forth in substance only a denial of such ultimate conclusion and a prayer for a hearing.

"6. The Interstate Commerce Commission declined to grant to the railroad carriers a hearing as prayed in their petitions of November 12, 1932, and November 14, 1932, and without such hearing, on December 10, 1932, entered its said second supplemental report and order in *Ex Parte* 102, Application of American Barge Line Company, in which plaintiffs and certain other carriers by railroad named therein were required to join with the American Barge Line Company in establishing, on or before January 25, 1933, upon fifteen days' notice, joint rail-barge-rail rates on cotton, in carloads, from the origin territory to the destination territory above described, upon a basis 8, 6, and 4 cents lower than the all-rail rates between the same points, dependent upon the application of varying minimum weights.

"7. The said second supplemental order of the Commission was made without evidence to support it, and there is no record before the Commission which may be examined by a court if called upon to

determine the legality or validity of the Commission's order.

"8. By petitions dated December 30, 1932, and January 7, 1933, the southwestern carriers by railroad, plaintiffs herein, on their own behalf and on behalf of other carriers by railroad similarly situated, requested the Commission to vacate and set aside the said second supplemental order of December 10, 1932; to grant a reconsideration of all matters by the entire Commission; in connection with such reconsideration to afford said railroads a hearing prior to the effective date of any order; and to extend the effective date of said second supplemental order of December 10, 1932, in order to afford the Commission an opportunity to pass upon said petitions. The said petitions above referred to were denied by the Commission in its order of January 18, 1933.

"9. By appropriate orders of the Commission the said second supplemental order of the Commission of December 10, 1932, has been extended to become effective June 1, 1933, upon ten days' notice to the public.

"10. The said second supplemental order of the Commission will require the railroads serving the origin and destination territories involved to participate in joint through rail-barge-rail and barge-rail rates from points of origin in Arkansas and Memphis, Tennessee, to destinations in the States of Pennsylvania, New York, New Jersey, Massachusetts, Rhode Island, and Connecticut, upon a basis 4, 6 and 8 cents lower than the corresponding all-rail rates between the same points, and to observe such rail-barge-rail and barge-rail rates so constructed as a maximum rate as long as plain-

tiffs maintain all-rail carload rates on cotton between the same points of origin and destination heretofore referred to.

"11. The said second supplemental order of the Commission of date December 10, 1932, if made effective, will require carriers by railroad whose lines serve the State of Arkansas to participate in joint rail-barge-rail rates on cotton, in carloads, from Arkansas to the destination territory heretofore described, substantially lower than contemporaneously in effect via the all-rail routes in which such carriers now participate. In addition, such order will require carriers by railroad whose lines extend from Arkansas points to the St. Louis gateway to deliver cotton to the barge line at Memphis, Tennessee, for transportation by water to Pittsburgh, Pennsylvania, in many instances short-hauling such carriers and depriving them of the full use of their lines of railroad.

"12. Such carriers would, in the event the cotton is delivered to the barge line at Memphis, Tennessee, receive less revenue than if such cotton were transported over all-rail routes to the St. Louis gateway and there delivered to eastern rail connections.

"13. Carriers by railroad, plaintiffs in this action, who operate lines of railroad extending from the St. Louis gateway to the destination territory heretofore described, would, as to cotton moving rail-barge-rail, if the order of the Commission referred to becomes effective, take such cotton at Pittsburgh, Pennsylvania, instead of at St. Louis, and would thereby be deprived of the use of their lines of railroad extending from the St. Louis gateway to Pittsburgh, Pennsylvania, and would receive

less revenue than such carriers would receive if they enjoyed an all-rail haul from the St. Louis gateway to the destination territory involved under the all-rail rates now in effect.

"14. Carriers by railroad serving Memphis, Tennessee, with lines of railroad located west of Pittsburgh, as to cotton moving barge-rail, would be deprived of participation in the transportation of cotton, in carloads, moving from points in Arkansas and from Memphis, Tennessee, to the destination territory before set out. Lines of railroad operated by carriers extending eastward from Pittsburgh, Pennsylvania, to the destination territory involved, would be required to participate in rail-barge-rail rates from points in Arkansas, and barge-rail rates from Memphis, Tennessee, lower than now in effect via all-rail routes in which such carriers participate.

"15. If the said second supplemental order of the Commission becomes effective, plaintiffs will be unable to recoup in any manner any losses which they will sustain thereby and the damage done them will therefore be irreparable." (Rec., 117-120.)

In its order of January 18, 1933, denying appellees' petition for vacation of the order of December 10, 1932, and for a hearing, the Commission postponed the effective date of said order of December 10, 1932, until February 21, 1933, upon ten days' notice. (Rec., 50.) Appellees were therefore required to publish the rates required ten days prior to February 21, 1933, or incur the penalties prescribed by law. Their bill in the court below was filed February 2, 1933. Subsequent extensions of the Commission's order of December 10, 1932, were at the suggestion of the court below.

SUMMARY OF THE ARGUMENT.

I.

SECTION 3 (e) AS CONSTRUED AND ADMINISTERED BY THE INTERSTATE COMMERCE COMMISSION VESTS IN THAT BODY THE POWER TO REQUIRE THESE APPELLEES TO PARTICIPATE IN RAIL AND WATER ROUTES WITHOUT OPPORTUNITY TO BE HEARD BEFORE THE ENTRY AND ENFORCEMENT OF SUCH AN ORDER, AND THEREFORE VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DEPRIVES THESE APPELLEES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

Murray v. *Hoboken Land and Improvement Co.*, 18 Howard 272..

Dartmouth College Case, 4 Wheaton 517.

Twining v. *New Jersey*, 211 U. S. 78.

Powell v. *Alabama*, 287 U. S. 45.

Louisville & Nashville R. R. Co. v. *Kentucky*, 183 U. S. 503.

Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88.

Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541.

Manufacturers Ry. Co. v. *United States*, 246 U. S. 457.

Oregon Railroad & Navigation Co. v. *Fairchild*, 224 U. S. 510.

New York & Queens Gas Co. v. *McCall*, 245 U. S. 345.

Louisville & Nashville R. R. Co. v. *Finn*, 235 U. S. 601.

Tri-State Telephone & Telegraph Co. v. *Benson*, Public Utilities Reports, 1933A, 38.

Central of Georgia Ry. v. *Georgia Railroad Commission*, 215 Fed. 421.

National Automobile Service Corporation v. *Barfod*, 137 Atl. 601.

H. Moffat Co. v. *Hecke*, 228 Pac. 546.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Board of Railroad Commissioners*, 247 Pac. 162.

Chamber of Commerce v. *Federal Trade Commission*, 13 F. (2d) 673.

II.

THE ORDER OF THE COMMISSION INVOLVED IN THIS PROCEEDING IS VOID BECAUSE MADE WITHOUT EVIDENCE TO SUPPORT IT.

Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88.

Florida East Coast Ry. Co. v. *United States*, 234 U. S. 167.

Philadelphia & Reading R. Co. v. *United States*, 240 U. S. 334.

B. & O. R. R. Co. v. *United States*, 277 U. S. 291.

Brimstone R. R. Co. v. *United States*, 276 U. S. 104.

Interstate Commerce Commission v. *N. P. Ry. Co.*, 216 U. S. 538.

Virginian Ry. Co. v. *United States*, 272 U. S. 658.

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1.

Western Chemical Co. v. *United States*, 271 U. S. 268.

Georgia Commission v. *United States*, 283 U. S. 765.

New York Central Securities Corp. v. *United States*, 287 U. S. 12.

Norfolk & Western Ry. Co. v. *United States*, 287 U. S. 134.

III.

SECTION 3 (e) AS CONSTRUED AND ENFORCED AUTHORIZES THE ENTRY OF AN ORDER WITHOUT A HEARING, DENIES TO THE PARTIES THE RIGHT TO A JUDICIAL REVIEW OF SUCH ORDER, AND IS ARBITRARY AND UNREASONABLE.

Coe v. *Armour Fertilizer Works*, 237 U. S. 413.

Stuart v. *Palmer*, 74 N. Y. 183.

Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541.

Interstate Commerce Commission v. *I. C. R. R. Co.*, 215 U. S. 452.

Southern Pacific Co. v. *Inter. Com. Comm.*, 219 U. S. 433.

Interstate Commerce Commission v. *N. P. Ry. Co.*, 216 U. S. 538.

Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144.

Norfolk & Western Ry. Co. v. *United States*, 287 U. S. 134.

Procedure under Barge Line Act, 148 I. C. C. 129.

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Beaumont, Sour Lake & Western Ry. Co. v. *United States*, 282 U. S. 74.

Hammond v. *Schappi Bus Line*, 275 U. S. 164.

Florida v. *United States*, 282 U. S. 194.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Minnesota*, 134 U. S. 418.

Minneapolis Eastern Ry. Co. v. *Minnesota*, 134 U. S. 467.

Trustees of Saratoga Springs v. *Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123; 83 N. E. 693.

Norwegian Nitrogen Products Company v. *United States*, 288 U. S. 294.

Southern Railway Company v. *Commonwealth of Virginia*, decided December 4, 1933, ... U. S. .....

IV.

SECTION 3 (e) AS CONSTRUED AND ENFORCED AUTHORIZES THE COMMISSION TO ESTABLISH JOINT RAIL AND WATER RATES AND ROUTES WITHOUT HEARING OR EVIDENCE, AND CONSTITUTES A DELEGATION OF LEGISLATIVE POWER CONTRARY TO THE PROVISIONS OF ARTICLE I, SECTION 1, OF THE CONSTITUTION.

Prentis v. *Atlantic Coast Line Company*, 211 U. S. 210.

Interstate Commerce Commission v. *Cincinnati R. Co.*, 167 U. S. 479.

Texas and Pacific Ry. Co. v. *Interstate Commerce Commission*, 162 U. S. 197.

United States v. *Atchison, T. & S. F. Ry.*, 234 U. S. 476.

Wichita R. R. Co. v. *Public Utilities Comm.*, 260 U. S. 48.

Mutual Film Corporation v. *Ohio Industrial Commission*, 236 U. S. 230.

Hampton & Co. v. *United States*, 276 U. S. 394.

New York Central Securities Corp. v. *United States*, 287 U. S. 12.

Fong Yue Ting v. *United States*, 149 U. S. 698.

United States v. *Zucker*, 161 U. S. 475.

Wong Wing v. *United States*, 163 U. S. 228.
Turner v. *Williams*, 194 U. S. 279.
Chin Yow v. *United States*, 208 U. S. 8.
Tang Tun v. *Edsell*, 223 U. S. 673.
Low Wah Suey v. *Backus*, 225 U. S. 460.
Zakonaite v. *Wolf*, 226 U. S. 272.
Goldsmith v. *Board of Tax Appeals*, 270 U. S. 117.
Southern Railway Company v. *Commonwealth of Virginia*, decided December 4, 1933, ... U. S. .....

V.

APPELLEES PURSUED THEIR ADMINISTRATIVE REMEDIES TO THEIR ULTIMATE CONCLUSION AND ONLY APPEALED TO A COURT OF EQUITY FOR AN INJUNCTION AFTER THEIR EVERY PETITION FOR A HEARING HAD BEEN DENIED AND THEY WERE FACED WITH THE ALTERNATIVE OF COMPLIANCE WITH THE COMMISSION'S ORDER OR OF ASSUMPTION OF THE RISK OF HEAVY PENALTIES FOR ITS DISOBEDIENCE.

Procedure under Barge Line Act, 148 I. C. C. 129.
Through Routes and Joint Rates, 167 I. C. C. 385.
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Through Routes and Joint Rates, 172 I. C. C. 525.
Sugar from Points in Louisiana to Arkansas via Rail-Barge-Rail Routes, 167 I. C. C. 710.
American Barge Line Company, 190 I. C. C. 177.

VI.

SUSPENSION OF THE EFFECTIVE DATE OF AN ORDER PURSUANT TO SECTION 15 (7), BEING WHOLLY OPTIONAL WITH THE COMMISSION, DOES NOT ACCORD APPELLEES DUE PROCESS OF LAW.

Coe v. *Armour Fertilizer Works*, 237 U. S. 413.

Stuart v. *Palmer*, 74 N. Y. 183.

Louisville & Nashville R. R. Co. v. *Stock Yards Co.*, 212 U. S. 132.

Through Routes and Joint Rates, 163 I. C. C. 716.

Sugar from Louisiana to Arkansas, 167 I. C. C. 710.

Cotton and Cotton Linters from the South and Southwest, 183 I. C. C. 33.

Through Routes and Joint Rates, 153 I. C. C. 129.

VII.

APPELLEES IN THIS PROCEEDING PURSUED THE ONLY REMEDY AVAILABLE TO THEM AND THE ONE EXPRESSLY PROVIDED BY STATUTE.

Wadley Southern Ry. v. *Georgia*, 235 U. S. 651.

VIII.

THE ORDER OF THE COMMISSION HERE INVOLVED CONSTITUTING AN EXERCISE OF ITS RATE MAKING POWER WOULD, IF ENFORCED, DIRECTLY AND ADVERSELY AFFECT APPELLEES AND THEY MAY PROPERLY CHALLENGE SUCH ORDER IN THE MANNER PROVIDED BY STATUTE.

Louisville and Nashville Railroad Company v. *Kentucky*, 183 U. S. 503.

Moffat Tunnel League et al. v. *United States et al.* 289 U. S. 113.

Pittsburgh & West Virginia Railway Company v. *United States et al.*, 281 U. S. 479.

Alexander Sprunt & Sons, Inc., et al. v. *United States*, 281 U. S. 249.

Edward Hines Yellow Pine Trustees, et al. v. *United States, et al.*, 263 U. S. 143.

United States et al. v. *Los Angeles & Salt Lake Railroad Company*, 273 U. S. 299.

The Delaware and Hudson Company, et al. v. *United States, et al.*, 266 U. S. 438.

Pendergast v. *New York Telephone Company*, 262 U. S. 43.

Northern Pacific Ry. Co. v. *Department of Public Works*, 268 U. S. 39.

Indiana General Service Co. v. *McCardle*, 1 Fed. Sup. 113.

IX.

BY REASON OF THE REFERENCE TO SECTION 15 (3) OF THE INTERSTATE COMMERCE ACT FOUND IN SECTION 3 (e) OF THE INLAND WATERWAYS ACT, SAID SECTION 3 (e) MIGHT BE CONSTRUED SO AS TO SAVE ITS CONSTITUTIONALITY.

St. Louis Southwestern Ry. Co. v. *Arkansas*, 235 U. S. 350.

Ann Arbor R. R. Co. v. *United States*, 281 U. S. 658.

Interstate Commerce Commission v. *Oregon-Washington Railroad & Navigation Company*, 288 U. S. 14.

ARGUMENT.

I.

SECTION 3(e) AS CONSTRUED AND ADMINISTERED BY THE INTERSTATE COMMERCE COMMISSION VESTS IN THAT BODY THE POWER TO REQUIRE THESE APPELLEES TO PARTICIPATE IN RAIL AND WATER ROUTES WITHOUT OPPORTUNITY TO BE HEARD BEFORE THE ENTRY AND ENFORCEMENT OF SUCH AN ORDER, AND THEREFORE VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DEPRIVES THESE APPELLEES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

The term "due process of law" which is stated by this court to be equivalent in meaning to the words "law of the land" contained in the *Magna Charta* (*Murray* v. *Hoboken Land and Improvement Co.*, 18 Howard 272), is difficult of definition. Probably no more satisfactory summation of its meaning as gleaned from the law declared in the courts of England and the United States would be than that it protects the citizen from the arbitrary exercise of governmental power. This thought seems uppermost in all of the definitions of due process stated by courts and jurists. This was recognized in the famous definition of "law of the land" as pronounced by Daniel Webster in his argument in the *Dartmouth College case*, where he stated (4 Wheaton 517) at page 581:

> "By the law of the land, is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules

which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions, of the highest importance, completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country."

There have been many changes in the law and the form of its administration since the granting of the *Magna Charta* by King John, and the exercise of broad powers by administrative tribunals such as the Interstate Commerce Commission was unknown to that period; but throughout the changing eras the courts have recognized that the fundamental right of the citizen against the arbitrary exercise of governmental power must be preserved as was declared in that famous instrument.

This thought finds clear expression in the opinion of the United States Supreme Court in *Twining* v. *New Jersey*, 211 U. S. 78, where at page 101 it is stated by Mr. Justice Moody:

"*Second.* It does not follow, however, that a procedure settled in English law at the time of the

emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment. That, said Mr. Justice Matthews, in the same case, p. 529, 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.' *Holden* v. *Hardy,* 169 U. S. 366, 388; *Brown* v. *New Jersey,* 175 U. S. 172, 175.

"*Third.* But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government. This idea has been many times expressed in differing words by this court, and it seems well to cite some expressions of it. The words due process of law 'were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' *Bank of Columbia* v. *Okely,* 4 Wh. 235, 244 (approved in *Hurtado* v. *California,* 110 U. S. 516, 527; *Leeper* v. *Texas,* 139 U. S. 462, 468; *Scott* v. *McNeal,* 154 U. S. 34, 45)."

This court again but recently reaffirmed its concept of due process of law in the case of *Powell* v. *Alabama,* 287 U. S. 45, where it stated at page 68:

"It never has been doubted by this court, or any other so far as we know, that notice and hearing

> are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions. In *Holden* v. *Hardy*, 169 U. S. 366, 389, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, *Galpin* v. *Page*, 18 Wall, 350, 368-369, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so."

Thus foremost among those fundamental rights protected by the law of the land is the right of the citizen to a hearing and his day in court before being deprived of his property. That right has been consistently recognized by the Supreme Court in cases involving orders of the Interstate Commerce Commission and State regulatory bodies of exactly the same nature as are before the court in this proceeding.

The orders of the Commission establishing rates are of the character that must be surrounded by due process of law. In *Louisville & Nashville R. R. Co.* v. *Kentucky,* 183 U. S. 503, the court at page 510 states:

> "* * * that the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; * * *"

In *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, there was involved the legality of an order of the Interstate Commerce Commission establishing certain railroad freight rates, in which proceeding the Government urged that the order could not be set aside even if the finding of the Commission was wholly without substantial evidence to support it. The court said at page 91:

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recog-

nized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' "

Further on page 92 the court said:

"Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. *Int. Com. Comm.* v. *Northern Pacific Ry.*, 216 U. S. 538, 544. In a case like the present the courts will not review the Commission's conclusions of fact (*Int. Com. Comm.* v. *Delaware, etc.* Ry., 220 U. S. 235, 251), by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' 36 Stat. 551."

In *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, the court enumerates (page 547) the grounds upon which orders of the Interstate Commerce Commission may be set aside:

"There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the

power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Int. Com. Com.* v. *Ill. Cent.*, 215 U. S. 452, 470; *Southern Pacific* v. *Int. Com. Com.*, 219 U. S. 433; *Int. Com. Com.* v. *Northern Pacific*, 216 U. S. 538, 544; *Int. Com. Com.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 174.

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts

will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

To the same effect is the statement of the Supreme Court in *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, where at page 481, the court declares:

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U. S. 144, 170), and upon which its decisions, made the basis of administrative orders operating *in futuro,* are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."

In this proceeding the order of the Commission is clearly within the condemnation of the decisions of the Supreme Court referred to, for the order of the Commission is without evidence to support it, because the Commission in its construction of Section 3(e) conceived that it was required to make the order here assailed without any hearing whatsoever.

While Section 15 of the Interstate Commerce Act, dealt with in the opinions of the Supreme Court just cited, requires a full hearing prior to any order of the Commission, it is nevertheless obvious that the decisions of the court were not based upon grounds merely of statutory construction but were declaratory of broad constitutional provisions. Thus, the statement of the court in *Interstate Commerce Commission* v. *Louisville and Nashville R. R. Co., supra,* page 91, to the effect that

a finding without evidence "comes under the Constitution's condemnation of all arbitrary exercise of power." In other words, was contrary to the law of the land.

Similarly the statement in *Interstate Commerce Commission* v. *Union Pacific R. R. Co., supra,* that an order of the Commission may be set aside, among other grounds, "if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power," is broader than the statutory requirement for a full hearing; and for the exercise of a right of a party to set aside an order of the Commission on such grounds would necessarily require a hearing whether such right be specified in the statute or not.

That the right to a hearing prior to an order in matters of this kind is constitutional in character and not merely statutory is conclusively established by the opinion of the Supreme Court in *Oregon Railroad & Navigation Co.* v. *Fairchild,* 224 U. S. 510. In that case the Supreme Court of the United States by writ of error directed to the Supreme Court of the State of Washington, reviewed an order of the Railroad Commission of that State requiring the installation of certain track connections pursuant to a statute of the State of Washington. The statute in question authorized the action taken by the Commission on complaint or on inquiry on its own motion after a full hearing. (Session Laws, 1905, chapter 81, page 145, as amended March 16, 1907, Session Laws, 1907, chapter 226, page 536.)

At page 524 of its opinion the court states:

> "* * * the hearing which must precede the taking of property is not a mere form. The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen but to give legal effect to what has been established."

In its decision the court found that the hearing granted under the Washington law was an adequate one, but reversed the order of the Washington Commission on the ground it was without proper evidence to support it.

The importance of this case lies, however, in the fact that the Supreme Court of the United States undertook to determine the adequacy of a hearing and whether the order made after such hearing supported the evidence, and that it could exercise this right only under the theory that the failure of the state law to accord an adequate hearing or to require decision of the case in accordance with the evidence violated the due process clause of the Fourteenth Amendment to the Constitution of the United States, which, of course, guarantees the same right to citizens against arbitrary action of the state as is guaranteed them against arbitrary action of the Federal Government by the Fifth Amendment to the Constitution of the United States. Compliance or noncompliance with the Washington statute was immaterial. The right of plaintiff in error to a hearing which was reviewed by the United States Supreme Court was the right to such hearing accorded him by the Fourteenth Amendment to the Constitution and not by the law of the State of Washington.

That the right to a hearing and that a decision in any

case must be in accordance with the evidence at such hearing is not merely statutory but constitutional in nature, is further disclosed by the decision of the Supreme Court in *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, where that court reviewed an order of the Public Service Commission of the State of New York. In the course of its opinion in that case the court, referring to its opinion in *Interstate Commerce Commission* v. *Union Pacific R. R. Co., supra,* and other cases of like character, said (page 348):

> "It is the result of these and similar decisions, that while in such cases as we have here this court is confined to the federal question involved and therefore has not the authority to substitute its judgment for that of an administrative commission as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence which was before the Commission for the purpose of determining whether it preponderates for or against the conclusion arrived at, yet it will, nevertheless, enter upon such an examination of the record as may be necessary to determine whether the federal constitutional right claimed has been denied, as, in this case, whether there was such a want of hearing or such arbitrary or capricious action on the part of the Commission as to violate the due process clause of the Constitution."

Further and convincing recognition that cases declaring the necessity of a hearing and decision in accordance with the evidence adopted at such hearing were bottomed upon constitutional grounds is found in the opinion of the Supreme Court in *Louisville & Nashville R. R. Co.* v. *Finn*, 235 U. S. 601. At page 606 of that opinion the court says:

> "To deal first with the rate order. In cases arising under the Interstate Commerce Act, the provisions of which contemplate an investigation or inquiry conducted with some formality, followed by a written report and decision as the basis of the orders, it has been repeatedly held by this court that an administrative order made indisputably contrary to the evidence, or without any evidence, must be deemed to be arbitrary, and therefore subject to be set aside. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 91, 92. It is contended that the 'due process' provision of the Fourteenth Amendment imposes a like rule of procedure upon the States with respect to their exercise of the legislative power of rate-making."

The principle that in the exercise of the rate-making power by administrative bodies a hearing must be accorded the parties in order to afford due process of law, finds support also in many decisons of the lower federal courts and state courts of last resort, and in the writings of juristic students upon this subject.

In *Tri-State Telephone & Telegraph Co.* v. *Benson*, Public Utilities Reports, 1933A, 38, decided September 14, 1932, the United States District Court for the District of Minnesota enjoined an order of the Minnesota Railroad and Warehouse Commission, temporary in character, and to be effective only pending final determination of an investigation being conducted by the Commission, which temporary order was made without affording the Telephone Company the right to a hearing.

The Minnesota statute provided for hearing before order of the Commission but was silent as to the necessity for hearing before a temporary order of the character

set forth. The District Court held in effect that whether or not the state statute required hearing before a temporary order, the making of such order without a hearing would not constitute due process. The language of the District Court upon this point is as follows (*Public Utilities Reports* 1933A, 38, 41):

> "While the Supreme Court has not construed the statute on this point, yet, in the absence of such construction by the Supreme Court of the statute in question, we hold that the statute applies to the fixing of temporary rates as well as to final rates, and we hold that a hearing was not afforded to the telephone company before the fixing of the rates through the order of August 31, 1932 (P. U. R. 1933A, 26), and that the statute was not complied with. We are compelled to hold that there was not due process of law relating to the hearing in question."

In *Central of Georgia Ry.* v. *Georgia Railroad Commission*, 215 Fed. 421, it was held that where no statute or rule required the State Railroad Commission to give notice of and afford hearing in a proceeding to change an intrastate freight rate classification so as to reduce intrastate rates, the fact that the Georgia Commission did give notice to complainant railroad company by a letter addressed to one of its officers, as a matter of grace, did not constitute due process of law.

In *National Automobile Service Corporation* v. *Barfod*, 137 Atl. 601, which case involved the right of the insurance commissioner of Pennsylvania to take charge of the affairs of automobile service companies in certain contingencies without hearing, the Supreme Court of Pennsylvania said (page 602):

> "We have as a fixed principle in our law that no man shall be adjudged in person or property with-

out notice and an opportunity to appear and be heard. *Shambe* v. *D. & H. R. R.*, 268 Pa. 240, 135 A. 755. To condemn without a hearing is repugnant to the due process clause. 12 C. J. 1234, Sec. 1009; *Riverside, etc., Cotton Mills* v. *Menefee*, 237 U. S. 189, 35 S. Ct. 579, 59 L. Ed. 910. In applying this general rule it must be remembered that there are certain classes of decisions that are not appropriate for a judicial body to make, though they vitally affect private rights: this is because of the nonjudicial character of the investigation or proceeding. Therefore, due process is not necessarily judicial process. *Reetz* v. *Michigan*, 188 U. S. 505, 507, 23 S. Ct. 390, 47 L. Ed. 563; *U. S.* v. *Ju Toy*, 198 U. S. 253, 25 S. Ct. 644, 49 L. Ed. 1040; *Klafter* v. *State Board of Examiners of Architects*, 259 Ill. 15, 102 N. E. 193, 46 L. R. A. (N. S.) 532, Ann. Cas. 1914B, 1221. The requirement of due process of law, however, applies to administrative as well as to judicial proceedings. The doctrine of notice and hearing thus becomes a more potent force in our land, because it applies to the decisions and acts of administrative officials, and, unless there are extraordinary emergencies, this essential requisite of due process cannot be dispensed with."

In *H. Moffatt Co.* v. *Hecke*, 228 Pac. 546, in which case there was involved a California statute dealing with inspection and determination of ownership of cattle about to be slaughtered, and did not provide for notice, actual or constructive, to the owner, the District Court of Appeal for the First District of California stated (page 548):

"One who is in the possession of property under a claim of right cannot be deprived of its posses-

sion without due process of law. To constitute due process the statute itself must provide for notice of a time and place of hearing, giving to the parties an opportunity to present in a deliberate, regular and orderly manner issues of fact and law. It is essential to the validity of the statute that it furnish the means whereby one may enforce his constitutional rights."

The concluding sentence of the above quotation is particularly pertinent in that Section 3(e) of the Inland Waterways Corporation Act, if it does not provide for a full and fair hearing, denies to these appellees the right to test out or enforce their constitutional rights.

To the same effect is the decision of the Supreme Court of Montana in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Board of Railroad Commissioners*, 247 Pac. 162, which involved the legality of an order of the Commissioners, made without hearing, requiring the construction of an industrial spur. In that case the court at page 164 says:

"If, however, the Legislature, in enacting chapter 135 of the Laws of 1917, now 3833, intended to substitute that section for 3829, it would appear that it intended to do away with the provision for notice and hearing, and to substitute in lieu thereof the discretion of the board—in effect permitting that body to determine whether it would give notice of the proceeding and whether it would accord to the carrier a hearing.

"When we conceive that the board's order to the carrier to construct the spur track is in effect a taking of property, for it requires the carrier to use its property and spend its money (*State of Washington ex rel. R. & N. Co.* v. *Fairchild*, 224 U. S. 510,

32 S. Ct. 535, 56 L. Ed. 863), it would seem clear that an order to the carrier made without notice and without a hearing in effect would deprive the carrier of its property without due process of law. Before a valid order of the character in question can be made we hold that notice and opportunity to be heard is indispensable. *Missouri Pac. Ry.* v. *Nebraska,* 217 U. S. 196, 30 S. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989; *Union Lime Co.* v. *Railroad,* 144 Wis. 523, 129 N. W. 605; *Wichita R. & L. Co.* v. *Public Utility Com.,* 260 U. S. 48."

The case of *Chamber of Commerce* v. *Federal Trade Commission,* 13 F. (2d) 673, involved a cease and desist order of the Federal Trade Commission, but the remarks of the Circuit Court of Appeals for the Eighth Circuit, in connection with the necessity for a hearing prior to such an order by that body, apply with equal force to the necessity for a hearing before the Interstate Commerce Commission in matters of the character now before this court. At pages 683-684 the court in that case said:

"When 'cease and desist' orders come before a Court of Appeals, the proceedings in such court are of an equitable nature. However, the proceedings before the Commission are not judicial and are, therefore, not amenable to a rule designed to control only equitable proceedings before a body exercising judicial power. But the fact that Equity Rule 38 is not controlling does not determine the point raised here. While hearings before administrative bodies need not have all of the formality of judicial procedure but may be informal and, if suited to the matter involved, rather summary (*Davidson* v. *New Orleans,* 96 U. S. 104, 107, 24 L. Ed. 616; *Hagar* v.

Reclamation Dist., 111 U. S. 701, 708, 709, 4 S. Ct. 663, 28 L. Ed. 569; *Fallbrook Irr. Dist.* v. *Bradley*, 164 U. S. 112, 118, 17 S. Ct. 56, 41 L. Ed. 369), yet there are certain elements of fair play required by the Constitution which are necessary in any character of hearing affecting personal or property rights. In respect to hearings before administrative bodies (as well as judicial tribunals) those elements include (1) a reasonable time and place for hearing where interested parties may attend with reasonable effort (*Bellingham Bay & British Columbia R. Co.* v. *New Whatcom*, 172 U. S. 314, 319, 19 S. Ct. 205, 43 L. Ed. 460); (2) reasonable notice to interested parties (*Londoner* v. *Denver*, 210 U. S. 373, 385, 28 S. Ct. 708, 52 L. Ed. 1103; *English* v. *Arizona*, 214 U. S. 359, 29 S. Ct. 658, 53 L. Ed. 1030; *Bellingham Bay & British Columbia R. Co.* v. *New Whatcom*, 172 U. S. 314, 19 S. Ct. 205, 43 L. Ed. 460; *Bauman* v. *Ross*, 167 U. S. 548, 17 S. Ct. 966, 42 L. Ed. 270; *Fallbrook Irr. Dist.* v. *Bradley*, 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369; *Paulsen* v. *Portland*, 149 U. S. 30, 13 S. Ct. 750, 37 L. Ed. 637; *Lent* v. *Tillson*, 140 U. S. 316, 11 S. Ct. 825, 35 L. Ed. 419); and (3) a reasonable opportunity for presentation of such evidence and argument as are appropriate to the proceeding (*Londoner* v. *Denver*, 210 U. S. 373, 385, 386, 28 S. Ct. 708, 52 L. Ed. 1103)."

Notice and the right to a hearing in proceedings before administrative tribunals are, in the opinions of juristic writers, essential to compliance with the due process clause of the Federal and State constitutions. In an editorial note in 28 Harvard Law Review, at page 198, entitled "The Right to a Hearing before Administrative Tribunals," it is stated:

"* * * Doubtless freedom from procedural shackles is one of the chief ends sought in tribunals created in response to a demand arising out of the inefficiency of our traditional judicial procedure. But some limitation must be imposed upon the exercise of executive discretion in the conduct of quasi-judicial inquiries. In this country this limitation has been furnished by the express requirements of 'due process of law' in Federal and State constitutions, English tribunals not proceeding according to express authority of the supreme Parliament have also been held within similar limits.

"In general where deprivation of liberty or property is involved the essentials of due process of law on both sides of the Atlantic are notice and hearing. One familiar exception to this is found in those cases where the immediate exigencies of police protection sanction summary deprivation of property without any hearing whatsoever. Summary imposition of penalties for violation of immigration laws has also been justified as a condition imposed upon a privilege which may be denied altogether. But it is well settled that the mere fact that administrative officials are invested with powers involving deprivation of property in their exercise, does not justify such deprivation upon mere official fiat, without hearing. * * *"

In an article entitled "Administrative Tribunals" by Warren H. Pillsbury, 36 Harvard Law Review, 583, he states on page 587:

"The due process of law clause of the Fourteenth Amendment to the United States Constitution constitutes a standing guarantee of substantial justice, and prevents such caprice or arbitrary action as would prevent a litigant from having a substantially

fair trial. The requirement of due process means opportunity for a hearing, *i. e.*, opportunity to be present during the taking of testimony or evidence, to know the nature and contents of all evidence adduced in the matter, and to present any relevant contentions and evidence the party may have. In other words, that the party have his 'day in court.' Outside of this, the due process clause does not require any particular formality or any further proceedings characteristic of a formal trial in court. While a statute may confer upon an administrative board exemption from rules of evidence or procedure, it cannot authorize exemption from the due process clause, which is a permanent safeguard against the recurrence of abuses such as characterized the Court of 'Star Chamber.' ''

In ''Liberty in the Modern State,'' by Harold J. Laski, Professor of Political Science in the University of London (1930), the following appears in the chapter on ''The Nature of Liberty,'' (pages 38-41):

''But the judge's authority as a safeguard to our freedom is in the modern state threatened in another way. Modern legislation is so huge both in volume and extent that the average assembly has neither time nor energy to scrutinize its details. The modern habit is, therefore, to pass Acts which confer a general power, and to leave the filling in of details to the discretion of the department concerned. To this, I think, no one can really take exception. The state must do its work; and it must develop the agencies necessary to that end. But I think we have grave reason to fear when the growth of this delegated legislative authority is accompanied with, or followed by, the conference of powers upon government departments themselves to deter-

mine the question of whether the powers they take are legal or not. I regard the growth of delegated legislation as both necessary and desirable; but if it is not gravely to impair our freedom, it should, I think, be developed only under the amplest safeguards.

"Decisions, for instance, like that on the *Fu Toy Case* (189 U. S. 253), in the United States, and in *Arlidge v. Local Government Board* (1915—A. C. 120), in England, are clearly a real menace to the liberty of the subject. They suggest a type of executive justice for which the methods of the Star Chamber are the nearest analogy. No body of civil servants, however liberal-minded they may be, ought to be free both to make the law and to devise the procedure by which its legality may be tested; and that, be it remembered, without a power of appeal from their decision. It may be taken for granted that the modern state needs an administrative law; in matters, for instance, like rate-fixing in public utilities, in workmen's compensation cases, in matters concerning public health, the views of a body of experts in a public department are generally at least as valid as that of the judicial body. But one wants to be certain in arriving at his decision the expert has been compelled to take account of all the relevant evidence; that the parties to his decision have had their day in court."

In "A Grammar of Politics," also by Harold J. Laski, the following appears in Chapter 8 on "Political Institutions" (pages 393-394):

"* * * I have already suggested that the findings of an expert commission have a validity to which no judicial examination can pretend; the decision, for instance, of the New York Public Service

Commission that a gas company ought to provide gas service for a given district is almost inevitably more right than a decision pronounced by the courts in a similar case. And I do not think it is necessary to disturb such findings. What is essential is that we should have assurance that the methods utilized in reaching such decisions are judicially satisfactory; that, for instance, there is full time for the preparation of a case, proper rules of evidence, and so forth. Every such decision, therefore, ought to be open for scrutiny by the courts, not on the ground of its substance, but on the view that it is wanting in this regard. This, it may be noted, is the attitude taken by the Supreme Court of the United States. 'This court,' said Clarke, J.,—(*New York, etc.* v. *McCall,* 38 Sup. Ct. Rep. 122, 124), 'will * * * enter upon such an examination of the record as may be necessary to determine whether the federal constitutional right has been denied, * * * whether there was such a want of hearing, or such arbitrary or capricious action on the part of the Commission as to violate the due process clause of the constitution.' It is exactly such an assurance that the substance of due process has been observed that we require. It does not, I think, mean stereotyping any special procedure as the only proper method; administrative law, by its nature, demands elasticity. But it does mean that a judge, on examining the record of the case, can satisfy himself that the parties to it have had a full and fair hearing."

II.

THE ORDER OF THE COMMISSION INVOLVED IN THIS PROCEEDING IS VOID BECAUSE MADE WITHOUT EVIDENCE TO SUPPORT IT.

In denying to appellees herein their right to a full and fair hearing prior to the entry of the said second supplemental order of the Commission, the Commission necessarily made such order without legal evidence to support it, and the order is therefore void.

The necessity for legal evidence to support an order is clearly set forth in *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88. At page 93 of the court's opinion it is stated:

> "The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comm.* v. *Baird*, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that

the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. *United States* v. *Baltimore & Ohio S. W. R. R.*, 226 U. S. 14."

The question of whether or not an order of the Commission is supported by adequate evidence or by any evidence whatsoever, has been examined by the Supreme Court in a long line of cases. For the information of the court we list below a number of principal cases in which orders of the Commission were set aside because unsupported by the evidence.

Florida East Coast Ry. Co. v. *United States*, 234 U. S. 167.

Philadelphia & Reading R. Co. v. *United States*, 240 U. S. 334.

B. & O. R. R. Co. v. *United States*, 277 U. S. 291.

Brimstone R. R. Co. v. *United States*, 276 U. S. 104.

Interstate Commerce Commission v. *N. P. Ry. Co.*, 216 U. S. 538.

In addition there is listed below cases in which this question was gone into by the court but the order found to be supported by sufficient evidence.

Virginian Ry. Co. v. *United States*, 272 U. S. 658.

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1.

Western Chemical Co. v. *United States*, 271 U. S. 268.

Georgia Commission v. *United States*, 283 U. S. 765.

New York Central Securities Corp. v. *United States*, 287 U. S. 12.

Norfolk & Western Ry. Co. v. *United States*, 287 U. S. 134.

The order of the Commission here, being without adequate and legal evidence to support it, should be set aside, for clearly there is no distinction in principle or in fact between that class of cases in which the Commission's order has been set aside for lack of sufficient evidence, and such a case as is here presented, where not even a hearing was accorded and consequently there could be no evidence whatsoever.

III.

SECTION 3(e) AS CONSTRUED AND ENFORCED AUTHORIZES THE ENTRY OF AN ORDER WITHOUT A HEARING, DENIES TO THE PARTIES THE RIGHT TO A JUDICIAL REVIEW OF SUCH ORDER, AND IS ARBITRARY AND UNREASONABLE.

Section 3(e) has been construed by the Commission as authorizing and directing that body to make the order assailed without hearing and with evidence. This is to deny to the parties that right to review the legality of the Commission's action on appeal to the Courts which is specifically granted them by other sections of the law. The right to review orders and findings of the Commission is found in Section 41, paragraph 28, and Sections 43, 44, 45, 46 and 47 of Title 28, United States Code Annotated. It is obvious that the exercise of this right to review is impossible in the case of orders made without hearing or without evidence. In the absence of a hearing a reviewing Court would be unable to determine whether an order of the Commission is arbitrary and unjust, or whether the authority of the Commission has been exercised in such an unreasonable manner as to bring it within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power. Obviously there can be no inquiry by the Court as to whether the order is made without

evidence to support it, or contrary to the evidence, for there is no evidence. In law the action of the Commission must of necessity be arbitrary and unreasonable where it is directed to act without the benefit of testimony. It is not, of course, suggested that such arbitrary and unreasonable action would be intentional on the part of the Commission, but rather that such result would be unavoidable in view of the construction the Commission has placed upon the Act assailed. The validity of the law would not be saved if perchance in a particular case the action of the Commission were in fact reasonable, for what may be done under the law and not what was actually done is the test of its validity. This principle was stated by the Court in *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, where at pages 424-425 it quotes with approval from an early declaration of this doctrine in *Stuart* v. *Palmer*, 74 N. Y. 183, wherein at page 188 the Court stated:

> "It is not enough that the owners may, by chance, have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority be done."

The Supreme Court in a long line of cases has announced the principles that surround the judicial review of decisions of the Interstate Commerce Commission and has set forth the grounds upon which orders of the Commission may be set aside.

> *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S., 541, 547.

Interstate Commerce Commission v. *I. C. R. R. Co.*, 215 U. S. 452, 470.

Southern Pacific Co. v. *Inter. Com. Comm.*, 219 U. S. 433.

Interstate Commerce Commission v. *N. P. Ry. Co.*, 216 U. S. 538, 544.

Interstate Commerce Commission v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 174.

We have heretofore referred to the *Union Pacific* case, *supra*, in which the Court said that an order of the Commission is final unless, among other reasons, the Commission has acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it, or if the authority has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power.

The Supreme Court in applying the principle thus annunciated has set aside orders of the Commission made without evidence to support them. The Court in order to enable it to reach the conclusion that such orders were without evidence to support them was compelled to examine the record of a hearing before the Commission to reach its own conclusion whether or not there was substantial evidence to sustain the order of the Commission.

In one case, *Interstate Commerce Commission* v. *N. P. Ry. Co.*, 216 U. S. 538, for example, the Court had before it an order of the Commission requiring the establishment of through routes and joint rates covering the transportation of passengers and baggage. At that time the Commission had authority to establish through routes and joint rates, provided no reasonable or satisfactory route existed. The Court, speaking through

Mr. Justice Holmes, said it was urged that this condition was addressed only to the opinion of the Commission and could not be re-examined by the Courts as a jurisdictional fact. But the Court went on to say that it was of the opinion that the Commission had no power to make the order if a reasonable and satisfactory through route existed, and that the existence of such a route might be inquired into by the Courts.

To hold that the Commission can act without a hearing, that it can act without giving the parties an opportunity to be confronted with or know the facts upon which the Commission bases its action in order to disprove or rebut those facts, and to challenge their accuracy, is to deprive the parties of the right to have a judicial review of the order on a question that the Supreme Court has said many times may be considered and determined by the Supreme Court: whether there was evidence to sustain the order of the Commission.

Further indicating the necessity for a hearing before the Commission to enable the Courts to pass upon the questions that arise in a judicial review of the Commission's orders, attention is called to the case of *Southern Pacific Co.* v. *Inter. Com. Comm.*, 219 U. S. 433, in which the Court held that an order of the Commission may in consequence of the assumption of powers not possessed by it was void. And the Court to determine whether the Commission had in fact fixed rates upon considerations that could not validly be applied in passing upon the reasonableness of rates and whether the Commission assumed to exercise powers not possessed by it, had recourse to the record of the hearing before the Commission.

In a recent case, *Norfolk & Western Ry. Co.* v. *United States*, 287 U. S. 134, the Court said that the claim of

denial of due process was predicated by the railway company upon the assertion that the Commission's order was unsupported by the evidence; that the railway company invoked the principle that due process required not only a hearing but a fair consideration of the evidence. Upon an examination of the record before the Commission the Court said that an adequate hearing had been afforded and due weight given the evidence.

Certainly the principles of constitutional law as announced by the Supreme Court in all these cases contemplates that there shall be a hearing before the Commission; that both parties shall have an opportunity of presenting evidence, of cross-examining the witnesses of the adverse party, and of challenging by appropriate evidence the evidence of the adverse party; that it is only after such hearing has been held that the Commission may make a valid order, and that even then the order is open to review by the Courts on the question whether there was a fair hearing and whether there was substantial evidence to support the order in question. A holding at this time that no hearing is necessary therefore denies to the parties the right of a review of the Commission's decisions on questions that the Supreme Court has repeatedly said the Courts may consider in passing upon the validity of the Commission's orders.

However, the Commission speaking as a body, and individual Commissioners separately, have indicated the difficulties which surround their making of an order without hearing and evidence.

Mr. Commissioner Eastman, testifying before the House Committee on Interstate and Foreign Commerce of the House of Representatives when the bill which was subsequently enacted into Section 3(e) was before that body, stated with reference to the establishment of

through rail and water routes and differentials (page 395):

> "It does not seem to me that it is practicable for the Commission to determine such matters as these, if, indeed, it would be constitutional, without hearings and evidence; * * *"

Further at the same hearing at page 398 Mr. Eastman stated:

> "It seems to me that a hearing would be necessary in order to determine the through routes which ought to be established. It does not seem to me that every possible through routes which can be established between a rail line and the barge line is necessary or even desirable in the public interest."

Further confirmation of the complexity of the problems involved in the establishment of through rail and water rates and routes is found in the opinion of the Commission itself in *Procedure under Barge Line Act*, 148 I. C. C. 129, wherein the following language on page 140 of its opinion indicates that any brief summary hearing prior to its order would be ineffectual and futile.

> "It has been suggested that even if hearings in advance of our original action are not required, we might nevertheless hold such hearings as a matter of discretion. Those who have made suggestions of this sort have indicated that they have in mind brief hearings in which the introduction of evidence would be strictly limited. It is probable that they have not had occasion to become thoroughly familiar with the many pertinent and relevant questions which arise in the hearing of cases involving the establishment of through routes and joint rates over water lines and connecting railroads, the fixing of differentials between such rates and corresponding all-rail rates, and the prescription of equitable divi-

sions. Such a limitation of evidence as they have in mind we conceive to be impracticable, and prior 'full hearings' would plainly be destructive of the manifest intent of Congress."

Perhaps the strongest confirmation of the existence of the difficulties that beset the Commission when required to make an order without hearing is found in the separate concurring opinion of Mr. Commissioner Woodlock in *Through Routes and Joint Rates*, 153 I. C. C. 129, where at page 138 he terms the action of the Commission in making such order without hearing as a "leap in the dark."

Pertinent to this inquiry are those decisions of the Supreme Court in which that body indicates both to the Federal District Courts and to the Interstate Commerce Commission that a summary of the facts found and the reasons for their decisions are essential to proper review of the matters at issue when the case reaches that Court.

In *Beaumont, Sour Lake & Western Ry. Co.* v. *United States*, 282 U. S. 74, 86-87, the Supreme Court said:

"The Commission's failure specifically to report the facts and give the reasons on which it concluded that under the circumstances the use of the average or group basis is justified leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order. Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this. *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48, 58. And we have re-

cently emphasized the duty of such courts fully to state the grounds upon which they act. *Virginian Ry.* v. *United States,* 272 U. S. 658, 675. *Lawrence* v. *St. Louis-San Francisco Ry.* 274 U. S. 588, 591-592. *Arkansas Commission* v. *Chicago, R. I. & P. R. Co.,* 274 U. S. 597, 603. *Hammond* v. *Schappi Bus-Line,* 275 U. S. 164, 171. *Cleveland, C., C. & St. L. Ry.* v. *United States,* 275 U. S. 404, 414. *Baltimore & Ohio R. Co.* v. *United States,* 279 U. S. 781, 787. And the Commission is not excused by the fact that the carriers presented evidence on a group basis or by the omission of the southwestern lines in their petition for a rehearing to object to the use of averages. The proceedings before the Commission were for the determination of what divisions are and for the future will be reasonable. Here the issue is whether the Commission's amended determinations and the order based on them are valid. Appellants are not estopped from assailing the averages or groups adopted. A sound basis for the rule or formula prescribing the divisions is essential to compliance with the Act.".

In *Hammond* v. *Schappi Bus Line,* 275 U. S. 164, at page 171, the Court stated:

"These questions have not, so far as appears, been considered by either of the lower courts. The facts essential to their determination have not been found by either court. And the evidence in the record is not of such a character that findings could now be made with confidence. The answer denied many of the material allegations of the bill. The evidence consists of the pleadings and affidavits. The pleadings are confusing. The affidavits are silent as to some facts of legal significance; lack definiteness as to some matters; and present seri-

ous conflicts on issues of facts that may be decisive. For aught that appears, the lower courts may have differed in their decisions solely because they differed as to conclusions of fact. Before any of the questions suggested, which are both novel and of far reaching importance, are passed upon by this Court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence."

In *Florida* v. *United States*, 282 U. S. 194, the Court at page 215 considered the lack of essential findings of fact in the following language:

"The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted. (*The Beaumont, Sour Lake & Western Railway Company* v. *United States, ante,* p. 74), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported. If the facts as to intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates in order to end an unjust discrimination as against interstate commerce either as between persons and localities, or because of an undue burden upon the revenues of the carrier, the Interstate Commerce Commission is still at liberty, acting in accordance with the

authority conferred by the statute, to make such determinations as the situation may require."

The Supreme Court has thus indicated to the lower Courts and to the Commission the necessity for a statement of the facts found by the Commission and the grounds for its conclusions in order that there might properly be exercised that essential right of review conferred upon the parties.

It is apparent that without a hearing or any evidence whatsoever, the right of review of the legality of the Commission's order is completely denied appellees and the action of the Commission is necessarily arbitrary and unreasonable in law, as it is also a matter of fact by reason of its inability to determine the difficult problems involved in the establishment of rail and water rates and routes without the benefit of hearing in evidence.

In the case of *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418, this Court held at page 456 that the action of the State Commission in establishing rates without a hearing deprived the railway company of its right to a judicial investigation, by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy.

To the same effect is *Minneapolis Eastern Ry. Co.* v. *Minnesota*, 134 U. S. 467.

The necessity for a proper record in order to preserve the right of review was also declared by the Court of Appeals of New York in *Trustees of Saratoga Springs* v. *Saratoga Gas, Electric Light & Power Co.*, 191 N. Y. 123; 83 N. E. 693. At page 701 of the report of this case in the Northeastern Reporter the Court says:

"It is plain that no corporation could make its defense until it was clearly notified of what was

charged against it, and the proof to support such charge was given. While the Commission might not be bound by technical rules of evidence, still it was plainly intended that the whole proceeding should assume a quasi-judicial aspect. And this is necessarily so, for the Appellate Division is empowered to review the order of the Commission, a review which would require something in the shape of a record of the proceedings of the Commission."

Of special interest in connection with the necessity for a hearing before the Commission in order to preserve the right of review is the discussion upon this subject contained in the opinion of the Supreme Court announced by Mr. Justice Cardozo, February 6, 1933, in *Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294, wherein it is stated at page 319:

"The Commerce Act, as it stands to-day, and kindred statutes in the states, are instinct with the recognition of a duty to give a hearing of such a kind that the courts will understand why a Commission has acted as it has if their supervisory powers are afterwards invoked for enforcement or revision."

The most recent announcement by this court of the necessity for a hearing in order to afford a real right of review was made in *Southern Railway Company* v. *Commonwealth of Virginia*, decided December 4, 1933, ... U. S. ....., where there was involved the legality of a law of the State of Virginia which empowered the Highway Commissioner of that state to require the elimination by railroad companies of grade crossings without prior notice or hearing. The Railway Company contended among other things that the statute afforded it no possibility of an adequate judicial review of the Highway Commission-

er's act. With regard to this contention, the court, speaking through Mr. Justice McReynolds, said:

> "After affirming appellant's obligation to comply with the Commissioner's order, the court below said— 'The railroad is not without remedy. Should the power vested in the Highway Commissioner be arbitrarily exercised, equity's long arm will stay his hand'. But by sanctioning the order directing the Railway to proceed it, in effect, approved action taken without hearing, without evidence, without opportunity to know the basis therefor. This was to rule that such action was not necessarily 'arbitrary'. There is nothing to indicate what that court would deem arbitrary action or how this could be established in the absence of evidence or hearing. In circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion."

IV.

SECTION 3(e) AS CONSTRUED AND ENFORCED AUTHORIZES THE COMMISSION TO ESTABLISH JOINT RAIL AND WATER RATES AND ROUTES WITHOUT HEARING OR EVIDENCE, AND CONSTITUTES A DELEGATION OF LEGISLATIVE POWER CONTRARY TO THE PROVISIONS OF ARTICLE I, SECTION 1, OF THE CONSTITUTION.

In the brief of appellees, United States and Interstate Commerce Commission, appellees' contention that Section 3(e) constitutes an unconstitutional delegation of legislative power is construed as being merely a pertinent ancillary to their contention that the statute de-

nies to them due process of law contrary to the fifth amendment. Such is not the case. The attempt by Congress to confer upon the Commission a purely legislative function constitutes a separate and independent violation of the requirements of the Constitution of the United States.

The making of rates for the future is a legislative act (*Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210), and while the Congress might, without hearing, itself establish a rate (as investigation on its part in theory at least is presumed), the power so to act without hearing or investigation cannot be delegated to the Commission or any other body.

The Interstate Commerce Commission is not invested, and cannot under the Constitution be invested, with legislative power. *Interstate Commerce Commission* v. *Cincinnati R. Co.*, 167 U. S. 479; *Texas and Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197; *United States* v. *Atchison, T. & S. F. Ry.*, 234 U. S. 476.

The general doctrine as to the extent to which the authority of the Legislature may be delegated to an administrative agency is concisely stated by the Supreme Court in *Wichita R. R. Co.* v. *Public Utilities Comm.*, 260 U. S. 48, where the Court examined into the powers of the Kansas Commission over rates for electric light and power charged in that State. At page 59 the Court states:

> "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and

show a substantial compliance therewith to give validity to its action."

The only rule of decision laid down in Section 3(e) is that the through rates and routes and minimum differentials required to be established thereby must be reasonable and lawful. Such reasonableness and lawfulness can be determined only by a full and fair hearing, and the establishment of rates and routes and differentials without such hearing constitutes necessarily an exercise by the Commission of pure legislative power.

In the case of *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 230, 245, the question arose as to whether the Ohio statute relating to censorship of motion pictures constituted an invalid delegation of legislative power. In discussing this question the Court said:

> "Undoubtedly the legislation must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply."

The clear distinction between the powers which may be exercised by Congress and by its agent, the Interstate Commerce Commission, is set forth by the Supreme Court in *Hampton & Co.* v. *United States*, 276 U. S. 394, where at page 407 the Court said:

> "Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all.

> Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down, that rates shall be just and reasonable considering the service given, and not discriminatory. As said by this Court in *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 214, "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

The question naturally arises, how may the Commission apply the policy and legal principles laid down by the Congress to particular situations, absent investigation of the facts and without a full and fair hearing? It is clear that Section 3(e) violates the principles set forth in the above cases by investing the Interstate Commerce Commission with power to establish through rail and water rates, routes and divisions without opportunity given to the rail carriers to be heard.

That the rate-making power of the Commission is a delegated legislative power to be executed by it only after determination as to whether the facts of a given case conform to the criteria prescribed by Congress, is further established by the decision of this Court in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, decided November 7, 1932. There was there involved

a question as to the legality of the action of the Commission under Section 5, paragraph (2), and Section 20a, dealing with certificates of convenience and necessity and issuance of securities, and the contention was made that the delegation of authority to the Commission was invalid because the stated criteria, that is, the public interest, was not certain. Dealing with this contention the Court said at page 25:

> "The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and to the issue of certificates of public convenience and necessity."

That in cases where there is a delegation to an executive or administrative body or official of power to apply and administer a law in accordance with the general directions therein set out, due process requires a hearing before such executive or administrative action is disclosed by the somewhat analogous cases relating to the exclusion and deportation of aliens. There the determination of the facts upon which an exclusion or a deportation order may be based is placed by the statute finally in the hands of officers of the executive branch

of the Government, and although the statute itself provides for hearing, the Court has uniformly held that such hearing must be a fair one and that the party involved shall have the right to summon and produce witnesses in its behalf and by counsel cross-examine those appearing against him.

Fong Yue Ting v. *United States*, 149 U. S. 698.
United States v. *Zucker*, 161 U. S. 475.
Wong Wing v. *United States*, 163 U. S. 228.
Turner v. *Williams*, 194 U. S. 279.
Chin Yow v. *United States*, 208 U. S. 8.
Tang Tun v. *Edsell*, 223 U. S. 673.
Low Wah Suey v. *Backus*, 225 U. S. 460.
Zakonaite v. *Wolf*, 226 U. S. 272.

Pertinent also is the case of *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117. In that case the Court held that although the statute creating the Board of Tax Appeals was silent as to its power to provide for the qualifications, etc., of persons practicing before it, it might nevertheless under its general power to make rules and regulations provide the qualifications necessary for attorneys and accountants to practice before it, but that before anyone should be excluded from such right such party was entitled to a full hearing before the Board in order to conform to the Fifth Amendment.

The fact that the Congress might act without a hearing in no sense implies that that body could delegate to the Commission any such power or authority. In support of this last statement we again refer to the case of *Southern Railway Company* v. *Commonwealth of Virginia, ex rel, supra*, decided December 4, 1933, in which this Court in dealing with an order of the Highway Commission of Virginia directing a railway company to sep-

arate the grades at a public crossing, without a hearing, said:

> "Counsel submit that the Legislature, without giving notice or opportunity to be heard, by direct order might have required elimination of the crossing. Consequently, they conclude the same end may be accomplished in any manner which it deems advisable without violating the Federal Constitution. But if we assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."

It is of great significance that Congress, in creating other administrative agencies with powers akin to those conferred upon the Interstate Commerce Commision, has recognized the requirements of due process and the prohibition against delegation of legislative power, by requiring that the functions of such other bodies akin to those of the Commission be exercised only after a hearing. Thus, in the Grain Futures Act, U. S. C. A., Title 7, Sec. 8, the Commission there provided for is authorized to revoke the designation of any board of trade as a contract market only after notice to such board of trade and upon a hearing.

In the Packers and Stock Yards Act, U. S. C. A., Title 7, Chapter 9, the rates and charges of stock-yard owners

or market agencies may be prescribed only after a full hearing.

In the Federal Trade Commission Act, U. S. C. A., Title 15, a cease and desist order in connection with any unfair competition in commerce may only be issued after a hearing.

The Commission in its second supplemental order in *Ex Parte No.* 102 and here assailed has prescribed, without hearing, without testimony, in fact without evidence of any character, water and rail rates, has determined the level of such rates, and has demanded that such water and rail rates should be a certain percentage lower than the all-rail rates between the same points, and this without evidence and without a hearing. To construe said Section 3 as authorizing such action on the part of the Commission constitutes a clear delegation of legislative power to that body.

V.

APPELLEES PURSUED THEIR ADMINISTRATIVE REMEDIES TO THEIR ULTIMATE CONCLUSION AND ONLY APPEALED TO A COURT OF EQUITY FOR AN INJUNCTION AFTER THEIR EVERY PETITION FOR A HEARING HAD BEEN DENIED AND THEY WERE FACED WITH THE ALTERNATIVE OF COMPLIANCE WITH THE COMMISSION'S ORDER OR OF ASSUMPTION OF THE RISK OF HEAVY PENALTIES FOR ITS DISOBEDIENCE.

Appellants upon brief advance the theory that appellees failed to exhaust their administrative remedies before seeking the protection of a Federal court of equity and that they might have secured a hearing had they filed a complaint pursuant to Section 3(e) of the Inland Waterways Corporation Act and sought a suspension by the Interstate Commerce Commission of the

rates published pursuant to the Commission's order pending a hearing on such complaint.

Appellees sought relief in a court of equity only after every petition they had filed with the Commission for a full and fair hearing had been denied and they were faced with the immediate alternative either of compliance with the Commission's order or the risk of incurring heavy penalties by reason of its disobedience.

At page 21 of the brief of the United States and the Interstate Commerce Commission it is said:

> "It is well settled that rates prescribed by the Interstate Commerce Commission may not be enforced until after the parties have been heard."

Again at page 25 of their brief those parties say:

> "The summary order which the Commission in sec. 3(e) is directed to issue, was never intended by Congress to be a final finding against the carriers. It is plain from the procedure ordained that the order is provisional in character. The rights of the parties are only tentatively fixed; they become finally fixed in the event the provision for a hearing is not invoked by the filing of a complaint."

This contention of appellants that the rail carriers are entitled to a hearing before orders made under Section 3(e) become effective constitutes the first intimation from any authoritative source since the enactment of Section 3(e) that any such right to hearings existed.

The interpretation of Section 3(e) now urged by counsel for appellants is contrary to the interpretation of such section formally announced on many occasions by the Interstate Commerce Commission, and finds no support in the language of Section 3(e) itself. If the rail carriers are entitled to any hearing it is not one which may be granted wholly at the Commission's dis-

cretion under Section 15(7), but is the full and fair hearing contemplated by Section 15(3) expressly referred to in Section 3(e), a hearing which, however, the Commission and counsel for appellants say appellees are not entitled to.

Shortly after the enactment of Section 3(e), the Commission instituted its proceedings entitled *Ex Parte No. 94* for the purpose of securing the views of interested parties with respect to the meaning and purpose of that section and with respect to the procedure which it should follow thereunder, particularly with reference to the extent to which public hearings were required. After a consideration of the views presented to it, the Commission on November 12, 1928, handed down its opinion in said proceeding, 148 I. C. C. 129, in which it construed Section 3(e) as directing it, upon the application of any common carrier by water on the inland waterways of the United States to which a certificate of convenience and necessity had been granted, to summarily establish joint through rail and water rates without according to the interested rail carriers or other parties a hearing upon the issues presented, leaving to such interested parties only a right to file a formal complaint in the event they believed themselves in any way aggrieved by such summary action of the Commission made without hearing. Such interpretation by the Commission of Section 3(e) announced by it in the proceeding just referred to has been uniformly followed by the Commission in other cases as well as in the proceeding now before this court.

In that proceeding, commencing at the foot of page 133, the Commission stated:

> "It thus appears that under the interstate commerce act we have full authority to establish through

routes and maximum joint rates over connecting rail and water lines and to prescribe the divisions of such joint rates; and that we may also, for good cause shown, at any time thereafter reconsider and reverse, change, or modify such requirements. But no such requirement may be made without prior full hearing, except that if we declare an emergency to exist we may establish temporarily through routes without notice or hearing. This recital of existing powers under the interstate commerce act is, we think, important, because it is a reasonable assumption that Congress did not, in the legislation here in question [Section 3(e)], intend merely to duplicate authority already granted."

There is here no intimation that a full and fair hearing will be granted prior to the effective date of the rates ordered.

In the same opinion, in considering whether the reference to paragraph (3) of Section 15 imported into Section 3(e) the requirement of a full hearing, the Commission stated (page 136):

"There is here no provision for a hearing, unless it be contained in the words, 'as provided in paragraph (3) of section 15 of the Interstate Commerce Act, as amended.' That paragraph makes provision for a full hearing, but in our opinion the procedure so prescribed is not imported into this legislation by the reference to the paragraph. If it is so imported, nothing of substance is added to existing law, so far as the establishment of through routes and joint rates is concerned."

According to the Commission's interpretation equally would nothing of substance be added to existing law were a hearing required under paragraph (7) of Section 15 instead of paragraph (3) of Section 15.

Continuing on the same page the Commission said:

> "The intention is clear that once the certificate of public convenience and necessity is granted, the order directing the establishment of through routes and joint rates shall issue either contemporaneously or immediately thereafter. This is inconsistent with a procedure that would require a full hearing prior to the issue of the order."

Would not hearings subsequent to the issuance of the order but prior to its effective date be equally inconsistent according to the Commission's interpretation of Section 3(e)?

Continuing further upon the same page the Commission states:

> "Clearly, we think, it was the intent to substitute in this way subsequent hearings for prior hearings."

Again at page 138 the Commission states:

> "In our opinion the only rational interpretation of the above-quoted provision is that it is an attempt to substitute for hearings prior to our orders establishing through routes and joint rates, fixing minimum differentials, and prescribing equitable divisions, subsequent hearings upon complaint. Otherwise the provision would in its entirety serve no substantial purpose, for, as we have already pointed out, section 16a of the interstate commerce act makes full and ample provision for the rehearing of decided cases and the modification or entire reversal of any orders which may have been entered therein."

That the Commission interpreted Section 3(e) as requiring it to make its orders effective prior to hearing is confirmed by the following language at page 140 of

its same opinion in *Procedure under Barge Line Act, supra:*

> "It has been suggested that even if hearings in advance of our original action are not required, we might nevertheless hold such hearings as a matter of discretion. Those who have made suggestions of this sort have indicated that they have in mind brief hearings in which the introduction of evidence would be strictly limited. It is probable that they have not had occasion to become thoroughly familiar with the many pertinent and relevant questions which arise in the hearing of cases involving the establishment of through routes and joint rates over water lines and connecting railroads, the fixing of differentials between such rates and corresponding all-rail rates, and the prescription of equitable divisions. Such a limitation of evidence as they have in mind we conceive to be impracticable, and prior 'full hearings' would plainly be destructive of the manifest intent of Congress."

Surely a hearing subsequent to the filing of tariffs but prior to their effective date would be equally destructive of the manifest intent of Congress as interpreted by the Interstate Commerce Commission.

Appellants failed to refer to any language of the Interstate Commerce Commission supporting the interpretation of Section 3(e) now advanced by them, for the very sufficient reason that no such language is to be found. The solemn pronouncements of the Commission are all to the contrary. They refer, however, to the separate concurring opinion of Mr. Commissioner Brainerd in *Procedure under Barge Line Act,* 148 I. C. C. 129, which separate expression was concurred in by Mr. Commissioner Farrell, in which separate expression the view was advanced that in order to comply with the requirements

of due process of law the Commission would be required, at the request of a carrier, to suspend rail and water rates ordered in without a hearing.

It is of extreme significance that any suggestion as to the duty of the Commission to suspend the rates prior to their effective date appears only in the separate expression of two Commissioners. Not the slightest intimation of the existence of any such right is found in the majority opinion. In fact the language of such majority opinion clearly indicates to the contrary, and it is obvious that the views of Messrs. Brainerd and Farrell were not concurred in by the other nine Commissioners. On a matter of such outstanding importance as whether or not the parties to a proceeding are entitled to a hearing before an order may be enforced against them, it is only reasonable to assume that if the majority of the Commission believes any such right existed an expression in clear and unequivocal terms to that effect might be looked for in its report. Not only is such expression totally absent, but the language of the report is clearly to the contrary, as has been the uniform administration of Section 3(e) by the Commission since its interpretation in *Procedure under Barge Line Act, supra.*

In the Commission's fourth supplemental report in *Through Routes and Joint Rates,* 167 I. C. C. 385, it said at page 389:

> "We recognize that the computation of rail-barge-rail rates under the formula is a task of considerable magnitude, that considerable time will be required to complete the task if the formula is literally applied, and that in many instances undesirable results will flow from its literal application. But it must be borne in mind that the formula was promulgated under the Denison Act, which directs us to require

without hearing rates, routes, and differentials which in our judgment are reasonable. The formula represents only our best judgment, with the information as yet before us, of what constitutes a general basis for the construction of reasonable rates and differentials. We shall be glad to consider suggestions from any source for improvements in the formula."

In *Ex Parte No. 99, Application of Mississippi Valley Barge Line Company,* 178 I. C. C. 224, the Commission said (226-7):

"* * * The southwestern lines also express the view that the *Ex Parte* 96 formula does not reflect the true relation between barge and rail transportation with respect to cost, and request that no additional barge-rail or rail-barge-rail rates be prescribed except after a hearing at which adequate evidence bearing on the respective costs is produced. In *Procedure under Barge Line Act,* 148 I. C. C. 129, 138, in referring to the Denison Act, we said:

> 'In our opinion the only rational interpretation of the above-quoted provision is that it is an attempt to substitute for hearings prior to our orders establishing through routes and joint rates, fixing minimum differentials, and prescribing equitable divisions, subsequent hearings upon complaint.'

"The interpretation above stated is inconsistent with the contention of the southwestern lines that no differential rates should be required except after hearing, but, as pointed out, the way is open to them to invoke the procedure providing for a hearing after establishment of the prescribed rates. * *"

In *Through Routes and Joint Rates,* 172 I. C. C. 525, fifth supplemental report, the Commission said at page 528:

"* * As we have pointed out in previous re-

> ports, our findings in a proceeding of this nature, being required to be made without the benefit of hearing or complete information, are necessarily general and summary in character and a review through formal hearings of such findings is available upon complaint of any of the interested carriers that the resulting through routes, joint rates, or differentials are unreasonable or otherwise unlawful."

In I. & S. Docket No. 3411, *Sugar from Points in Louisiana to Arkansas via Rail-Barge-Rail Routes,* 167 I. C. C. 710, the Commission said (714-5):

> "Except in so far as the Denison Act requires the prescription of joint rates and minimum differentials without hearing, it does not set aside the interstate commerce act. Certainly there is nothing in the Denison Act which deprives competing shippers or communities of the rights extended to them by section 3 of the interstate commerce act, which prohibits undue prejudice and preference, and there is nothing which sets aside the provision of Section 4 which prohibits higher rates from intermediate than from more distant points unless approved by us. The formula upon which the suspended rates are based is general in character, prescribed in a proceeding embracing rates on classes and thousands of commodities from and to thousands of points. It was issued without hearing and without knowledge of the facts here brought to our attention. The formula simply represents our best judgment under such circumstances of a general plan designed as nearly as may be to carry out the provisions of the Denison Act. * * *"

Certainly there is nothing in the foregoing language which even faintly suggests any intention on the part of the Commission to accord the parties a hearing before the rates prescribed become effective.

In the report of the Commission which is the subject of this appeal, *Application of American Barge Line Company,* 190 I. C. C. 177, Exhibit E, Record 111, it is stated at page 179 of the Commission's opinion:

> "In response to the considerable number of requests that these petitions be assigned for hearing, it should be pointed out that in *Procedure under Barge Line Act,* 148 I. C. C. 129, after instituting a proceeding to ascertain the views of interested parties with respect to the meaning and purpose of the Denison Act before undertaking its administration, we came to the conclusion that that act does not authorize hearings as to the differential rates referred to therein, being 'an attempt to substitute for hearings prior to our orders establishing through routes and joint rates, fixing minimum differentials, and prescribing equitable divisions, subsequent hearings upon complaint.' The reasons for that conclusion were very fully stated in that report, are quite as applicable here, and need not be repeated."

In the above quoted paragraph the Commission referred to the request of appellees and other carriers, dated November 12 and November 14, 1932, that they be accorded a hearing prior to the effective date of any order requiring joint rail and water rates, which documents are on file as Exhibits C (Rec. 87) and D (Rec. 103) in this proceeding. Subsequent to the issuance of the second supplemental report of the Commission of December 10, 1932 (Exhibit E, Rec. 111), the southwestern carriers by petitions dated December 30, 1932, and January 7, 1933 (Exhibits F (Rec. 111) and G (Rec. 112) herein), again requested the Commission to postpone the effective date of its order sufficiently to grant them a full and fair hearing as to the issues presented. Those petitions were denied by order of the Interstate

Commerce Commission dated January 18, 1933 (Exhibit H (Rec. 116) herein). In none of said orders of the Commission denying appellees' repeated requests for a hearing is there even the slightest intimation that such hearing might be obtained were they to file a complaint and request postponement of the effective date of the Commission's orders pending determination of the issues presented in such complaint. While in the Commission's order of January 18, 1933 (Exhibit H (Rec. 116)), denying appellees' petition for vacation of the order, reopening, rehearing, and dismissal, it is stated by the Commission that such action is "without prejudice to respondents' right to a summary hearing concerning the reasonableness of the through routes, joint rates and minimum differentials prescribed in the order of March 11, 1932, in said proceeding, as amended by said order of December 10, 1932, upon complaint filed as authorized by the Inland Waterways Corporation Act," there is no suggestion in such order that the effective date of the said second supplemental order of December 10, 1932, would be vacated pending determination of the issues which might be presented in any complaint filed with the Commission by appellees. By that order appellees were required to comply with the order by February 21, 1933, or otherwise incur the severe penalties prescribed for violation of orders of the Interstate Commerce Commission. Before such date for compliance, however, appellees on February 2, 1933, filed their bill of complaint in the District Court, and further postponements of the order were at the suggestion of the court. But for the intervention of the Federal court expressed in its suggestions for temporary postponements, and after hearing in the form of a final decree these appellees would have, at the risk of the penalties prescribed, been re-

quired to comply with the Commission's order without the benefit of a hearing.

It is argued that appellees have no legal rights, in so far as this proceeding is concerned, because they have not asked the Commission to suspend the rates. We ask this question: Will any court assume that the Commission, having denied to the appellees a hearing before ordering the rates to be established, would, upon the request of such appellees after the order was entered, suspend the application of the rates for the purpose of having a hearing to determine the very questions the carriers sought to have determined before the orders assailed were entered? Is it not a remarkable statement on the part of the appellants to assert that while the Commission refused a hearing before it entered the order, it would thereafter do the very thing it had refused to do, provided the carriers filed the rates?

In order to clarify the term "prior hearing," so many times used by the appellants in this case, it might be helpful to say that Section 3(e) as construed by the Commission provides neither for a prior nor subsequent hearing in a proceeding in which the rail-water-rail and water-rail rates are fixed. The idea seems to run through most of the arguments advanced by the several appellants and interveners that provision is made for a hearing in connection with the establishment of these rates. Nothing is further from the fact. The Commission prescribes the rates without a hearing and closes the case. If the rail carriers are dissatisfied, they may institute another and entirely separate proceeding before the Commission, at which separate proceeding the Commission will hear the complaint. In so far as this case is concerned, the order of the Commission is final. The fixing of the rates, and the requirement that these appellees shall join therein, is one proceeding before the

Commission; the trial before the Commission of any complaints the carriers may file is another.

The Commission in its opinion in *Procedure under Barge Line Act, supra,* pointed out (page 133) that it already possessed power to require joint rail and water rates after hearing, and that the Congress did not intend by the passage of Section 3(e) to duplicate the authority already granted. That such was not the intention of Congress is clear from a reference to the proceedings before that body. In House Report No. 1537, House of Rep., 71st Cong., 1st sess., appears the following statement (Rec. 124):

> "This policy of opposition on the part of many of the railroads has resulted in years of delay in the extension of the benefits of water transportation to interior communities and has seriously retarded the successful operation of the Inland Waterways Corporation. Unless such opposition on the part of the rail carriers is overcome and through routes, joint rates, and an equitable division of joint rates is made available without interminable delays and the heavy expenses necessary to carry on such proceedings before the Interstate Commerce Commission, privately owned transportation service will never be realized on the inland waterways of the country.
>
> "The hearings on this bill convinced the committee that legislation somewhat drastic is now not only needed but is necessary in order to fully carry out the purposes for creating the Inland Waterways Corporation, and to realize the benefits of the policy of Congress manifested by the large expenditures made for the improvement of our inland waterways.
>
> "Paragraph (e) of the bill was carefully prepared to accomplish this purpose. If enacted into law, it is believed by the committee that it will immediately

resu'[4] in overcoming the reluctance of many of the railroads to cooperate with the Inland Waterways Corporation, and will aid in bringing about such through routes, joint rates, and fair division of joint rates as will afford to the people a large part of the country the economies of cheaper transportation by water.

"This paragraph of the bill authorizes the Commission to direct connecting common carriers to join with the water carriers in through routes and joint rates, and to fix reasonable minimum differentials between all rail rates and joint rail and water rates; and it further authorizes the Commission to require the rail and water carrier to enter into negotiations for the purpose of establishing equitable divisions of joint rates within 30 days after such joint rates are established. If they fail to so agree upon equitable divisions within 120 days, the Commission shall itself determine and establish reasonable divisions of such rates. Provision is made for any carrier who feels aggrieved by such action of the Commission to make complaint and have a full hearing under short proceedings, and the Commission is authorized to give the hearing and decision of such question preference over all other questions pending before it, except such questions as are given preference by law. All carriers are thus given their day in court."

Also indicative of the intention of Congress is the following excerpt from the remarks of Congressman Newton when House Bill 13512 (Section 3(e)) was before the House on May 15, 1928, (Congressional Record, page 8770, 70th Congress, 1st session):

"The existing law provides for joint rates between the barge line and the railroads. Congress

very clearly has indicated its desire to foster the development of water transportation. There has been a great deal of delay and, it seems to me, unnecessary delay at times, in putting into effect these joint rates. The testimony before the Committee evidenced a lack of willingness at times on the part of some of the railroads to co-operate with this government barge line. The sooner a joint rate structure is put into effect the quicker this demonstration will be at an end. It has, therefore, become more and more apparent to those of us who want to see this demonstration successfully made that Congress must provide a more expeditious way for instituting these joint traffic arrangements between the barge lines and the railroads. *This the bill does.*" (Italics ours.)

"Furthermore, there is another reason: with joint rates, the shippers and receivers in the interior, off the river, get the benefit of this transportation. Without joint rates they do not get the benefit. Now that Congress has again expressed its policy in reference to this development of water transportation, I hope that in the future we will have more co-operation from the railroads of the country. If we do not get it, I believe these provisions will substantially expedite proceedings completing joint traffic arrangements and a suitable division of through rates."

It is evident, therefore, that the Congress clearly intended, for the purpose of securing haste in the establishment of joint rail and water rates, to dispense with any necessity for a hearing before such rates were enforced against the carriers.

It is also evident that the Commission so interpreted

the intention of Congress. At page 140 of its report in *Procedure under Barge Line Act, supra,* it said:

> "In referring to this matter on brief counsel for the Association of Railway Executives said:
>
> > 'It will thus be seen that the patron of the bill and the House committee, as shown by the majority report, took the position that no hearing in advance was essential before through routes and joint rates should be established, and that the requirements of due process of law would be fully complied with by providing for a subsequent hearing before the Commission of a dissatisfied carrier.
> >
> > 'It seems, therefore, that the intention of the proponents of this bill was to provide for the establishment of through routes and joint rates without any hearing in advance.'
>
> "Having ascertained the plain meaning of the legislation in question from the language employed, and finding in addition that this meaning is clearly supported by the reports of the legislative committees, we have gone as far as we think we ought to go. The constitutionality of what has been done is for the courts to decide and upon that question we express no opinion."

There can thus be no question that the Commission interprets Section 3(e) as requiring the establishment and enforcement of rail and water rates without a hearing. Otherwise of what significance is their observation that the constitutionality of what was done by Section 3(e) is a matter for the courts and not for that body.

Under the interpretation of Section 3(e) now advanced by counsel for appellants the procedure to accomplish the establishment of joint rail and barge line rates, instead of being shortened, would in fact be made longer and more cumbersome. Under such interpretation the Commission would first hand down its report

and order requiring the establishment of joint rates upon such basis as it might deem proper, and such rates would have to be filed and published by the carriers at substantial outlay of time and money, and thereafter upon complaint the rates would be suspended pending a hearing as a result of which the rates already filed and published might be amended or changed requiring further clerical effort to effect such purpose. Under such interpretation no possible purpose whatsoever would be served by in the first instance filing and publishing the rates required by the Commission. The procedure involved would be a futile one. The assertion that it was intended by the Congress is refuted by the proceedings before that body, by the language of the Act, and by the interpretation heretofore placed upon the Act by the Commission.

VI.

SUSPENSION OF THE EFFECTIVE DATE OF AN ORDER PURSUANT TO SECTION 15(7), BEING WHOLLY OPTIONAL WITH THE COMMISSION, DOES NOT ACCORD APPELLEES DUE PROCESS OF LAW.

Appellees submit that even under the interpretation placed upon Section 3(e) in the briefs of appellants, they are not assured of a hearing prior to the effective date of orders of the Commission under that section because whether or not the Commission will exercise its power of suspension and grant a hearing is wholly optional with it. That is conceded in the brief of appellants United States and Interstate Commerce Commission at page 30 where it is said:

> "Although the Commission under the aforementioned sections of the statute may refuse to grant a stay at its discretion, its action in the present case was pre-determined."

Section 15(7) is in part as follows:

"* * * and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. * * *"

It is hardly to be assumed that Congress intended to amend paragraph (7) of Section 15 to require in this class of cases that the power of suspension be not at the discretion of the Commission without even making any reference whatever in said section to Section 3(e) of the Inland Waterways Corporation Act. A hearing thus at the grace or option of the Commission does not save the constitutionality of Section 3(e). The Commission might exercise the discretion invested in it by paragraph (7) of Section 15, to refuse appellees' prayer for suspension and allow the rates to go into effect. In *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, the Supreme Court of the United States quotes with approval an early declaration of the principle that what may be done under the act constitutes the test of its constitutionality, made in *Stuart* v. *Palmer*, 74 N. Y. 183, wherein at page 188 the court stated:

"It is not enough that the owners may, by

> chance, have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done."

The same principle is concisely stated in *Louisville & Nashville R. R. Co.* v. *Stock Yards Co.*, 212 U. S. 132. At page 144 of the court's opinion in that case it is stated:

> "The constitution of Kentucky is simply a universal undiscriminating requirement, with no adequate provisions such as we have described. The want cannot be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such."

Thus, the fact that the Commission may, upon appellees' request, suspend the rates, does not save the constitutionality of the statute. Appellees' right to a hearing before their property is taken must be an absolute one.

The statement in the brief of appellants United States and Interstate Commerce Commission at page 11 that the Interstate Commerce Commission has made a practice of suspending orders under the Barge Line Act pending subsequent hearing is supported neither by a history of the Commission's administration of Section 3(e) nor by reference to the Commission cases cited in that brief. The issues in each of such cases were principally and primarily confined to whether the rates re-

quired by the Commission without hearing resulted in undue preference or prejudice contrary to Section 3 of the Interstate Commerce Act, or in violations of the long-and-short-haul clause of Section 4 of that Act. In *Through Routes and Joint Rates*, 163 I. C. C. 716, the rates required were suspended upon the protest of the Mobile Chamber of Commerce upon the ground that their publication would result in fourth-section departures and in violations of Section 3 prohibiting undue preferences and prejudices. Similarly in *Sugar from Louisiana to Arkansas*, 167 I. C. C. 710, and *Cotton and Cotton Linters from the South and Southwest*, 183 I. C. C. 33, the principal inquiry of the Commission was as to violations of Sections 3 and 4 in the rates prescribed. In none of the cases was there a full and complete inquiry as to the propriety of the formula as to routes and rates to be established or the maximum reasonable character of such rates. In fact in *Sugar from Louisiana to Arkansas, supra*, the Commission said at page 714 of its opinion:

> "The so-called Denison Act requires us to direct the rail and water carriers to establish through routes and joint rates with 'reasonable rules, regulations, and practices' and to—
>
> > 'fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service to apply until changed by the order of the commission.'
>
> Except in so far as the Denison Act requires the prescription of joint rates and minimum differentials without hearing, it does not set aside the interstate commerce act. Certainly there is nothing in the Denison Act which deprives competing shippers or communities of the rights extended to them by section 3 of the interstate commerce act, which pro-

hibits undue prejudice and preference, and there is nothing which sets aside the provision of section 4 which prohibits higher rates from intermediate than from more distant points unless approved by us. The formula upon which the suspended rates are based is general in character, prescribed in a proceeding embracing rates on classes and thousands of commodities from and to thousands of points. It was issued without hearing and without knowledge of the facts here brought to our attention."

Therefore, instead of these cases indicating a settled policy on the part of the Commission to suspend the rates required by it under Section 3(e) until full hearing might be afforded, they show the actual settled policy of the Commission to be to require the establishment and maintenance of such rates without such hearing. In fact, it should further be pointed out that in each of the three cases cited only a part of the rates required to be established by the Commission in orders issued under Section 3(e) were suspended and made the subject of investigation. The remainder of the rates were required to be maintained. All of the rates involved in the suspension proceedings were published in pursuance of the Commission's orders in *Through Routes and Joint Rates*, 153 I. C. C. 129, covering all classes and commodities, while the suspension proceedings involved only a small part of the adjustment required both as to commodities and points of origin and destination. It is therefore disclosed that the settled policy of the Commission is not to suspend rates required by it under Section 3(e) except where the rates so required may result in violations of other sections of the Act, such as Sections 3 and 4.

VII.

APPELLEES IN THIS PROCEEDING PURSUED THE ONLY REMEDY AVAILABLE TO THEM AND THE ONE EXPRESSLY PROVIDED BY STATUTE.

It is suggested in brief of appellants United States and Interstate Commerce Commission that appellees were not entitled to proceed by injunctive process in a court of equity against the order of the Interstate Commerce Commission here involved, but that their remedy lay in a refusal to obey such order or in ignoring it and awaiting the suit by the United States or the Interstate Commerce Commission for its enforcement. These appellants, however, advance with considerable hesitation the theory that the drastic penalties provided by the Interstate Commerce Act for failures to obey orders of the Commission would not have applied in the instant case. They say on brief, pages 28 and 29:

> "It is not at all clear, moreover, that penalties for disobedience of the Commission's order have been provided by the Act. While it is true that Section 3 (e), under examination, contains a reference to Section 15 (3) of the Interstate Commerce Act, and that violations of said Section 15 (3) are punishable by penalties described in Section 16 (8) of the Interstate Commerce Act, the fact that the orders of the Commission under said Section 15 (3) are to be issued only after full hearing, unlike the procedure in the section under consideration, would appear to make it highly doubtful that the penalties to be incurred for violation of the former section would be applicable in the present instance."

The penalty concerning the applicability of which such doubt is expressed by counsel for the United States and

the Interstate Commerce Commission consists of a fine of $5,000 for each offense, and in the case of a continuing violation each day is to be considered a separate offense. The magnitude of the sum at stake, were the procedure suggested by counsel for the government to be followed, is at once apparent. It is true that no rail carrier can be subjected to a penalty such as a fine without judicial proceeding, but it is also true that when a carrier is confronted with an order of the Commission by virtue of which it must comply or take the chances of being compelled to pay damages for failure to comply, or seek refuge in a court of equity to enjoin the enforcement of the order and protect itself from such penalties, it may in good faith adopt the method last stated and invoke the aid of a court of equity. This court is familiar with the cases, some of which are cited by defendants, to the effect that penalties do not accrue while a citizen in good faith is reviewing an order of an administrative body in the courts. Those cases also establish the salutary principle that a citizen is not required to refuse to obey the order and take his chances on suffering heavy penalties, but may test out the validity of the order as a plaintiff in a court of equity, and that it what appellees are doing in this proceeding. Such manner of procedure was especially approved by the United States Supreme Court in *Wadley Southern Ry. v. Georgia*, 235 U. S. 651, where at page 669 the court said:

> "But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the

penalty when that defense, as here, proved to be unsuccessful."

Here the appellees have resorted to the remedy approved in the *Wadley Southern case*, and expressly provided for in the statute.

In connection with the foregoing a somewhat unusual circumstance is presented where counsel for the Interstate Commerce Commission, while asserting the legality of a order of the Interstate Commerce Commission suggests that such order may be safely ignored or disobeyed by the parties against whom it is directed.

VIII.

THE ORDER OF THE COMMISSION HERE INVOLVED CONSTITUTING AN EXERCISE OF ITS RATE MAKING POWER WOULD, IF ENFORCED, DIRECTLY AND ADVERSELY AFFECT APPELLEES AND THEY MAY PROPERLY CHALLENGE SUCH ORDER IN THE MANNER PROVIDED BY STATUTE.

All of appellants assert that the order of the Commission involved in this proceeding affects no legal interests of appellees and hence they are without standing to maintain this suit. This contention is apparently advanced upon the theory that appellees' sole complaint is of possible loss of traffic to some competitor. Such is not the case.

Appellees complain of the unlawful exercise by the Interstate Commerce Commission of its maximum rate-making power and of the diversion of traffic from them only in so far as such diversion is affirmatively required by the Interstate Commerce Commission through its order requiring them to join with the American Barge Line Company as partners in through routes and through rates. They thus complain of an unlawful exercise by the Interstate Commerce Commission of a power directly

affecting them and compelling them to become the unwilling instruments of their own injury.

In the appellees' bill of complaint in the court below complaint was made that the order of the Commission would compel them to participate in joint rail and water rates substantially lower and yielding substantially less revenue than the all rail routes maintained by them. Complaint was and is also made of the diversion of traffic, but only in so far as such diversion is accomplished by the affirmative order of the Interstate Commerce Commission directed to these appellees. No complaint is or was made of the setting up or permitting by the Government of a competitive agency which might take traffic from these appellees. They do complain of the Commission requiring them to become partners with the Barge Line without affording appellees due process of law.

The order of the Commission involved in this proceeding constituted a direct exercise of its maximum rate-making power. While the maximum rates to be observed by these appellees pursuant to such order were expressed in the terms of differentials under existing all rail rates, nevertheless the rail and water rates so arrived at upon such differential basis constituted a basis of maximum rates which must have been observed by appellees had the order become effective. There was no question but that the exercise by the Commission of this function in an unlawful manner may be challenged by the carriers against whom it is directed in a three-judge court, and the cases to that effect are so numerous as to make citation unnecessary. In fact, this court has held that the exercise of such maximum rate-making power must be accompanied with due process of law. In *Louisville and Nashville Railroad Company* v. *Kentucky*,

183 U. S. 503, it is stated at page 510 of the Court's opinion:

> "* * * the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."

The case cited in the briefs of appellants in no way sustain their contentions that these appellees are without right to bring this suit. In all of the cases cited either a right of action was asserted by a party against whom no order was made or the action of the Commission was construed as not requiring affirmative action by anyone. Thus, in *Moffat Tunnel League et al.* v. *United States et al.*, 289 U. S. 113, the court held that the title plaintiff and other voluntary welfare associations and organizations had no right to bring a suit to challenge the validity of an order not in any manner directed against them. At page 120 the court said:

> "The case is utterly unlike *Chicago Junction Case*, 264 U. S. 258, 267; *Western Pacific Cal. R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47, and *Claiborne-Annapolis Ferry* v. *United States*, 285 U. S. 382. In each of these a carrier brought suit to set aside an order of the Commission. No question of its capacity to sue was involved. The order assailed directly affected its transportation business."

In *Pittsburgh & West Virginia Railway Company* v. *United States et al.*, 281 U. S. 479, the Pittsburgh & West Virginia Railway Company was held to be without right to challenge an order of the Interstate Commerce Commission granting to another railway company a certificate of public convenience and necessity to abandon one

of its stations and to use instead the facilities of a terminal established by other companies at Cleveland, Ohio. The court said of the Pittsburgh & West Virginia Railway Company, at page 487:

> "Its lines do not extend to Cleveland; and there is no suggestion that the order can affect it is as carrier."

Likewise, in *Alexander Sprunt & Sons, Inc., et al.* v. *United States,* 281 U. S. 249, a party against whom the order of the Commission complained of was not directed, and who was by such order required to do nothing, was held to have no right of action although such order incidentally affected its business.

To the same effect is the opinion of this Court in *Edward Hines Yellow Pine Trustees, et al.* v. *United States, et al.,* 263 U. S. 143, where a party against whom the order of the Commission was not directed, and who was only incidentally affected by the operation of that order, was held to have no independent right to bring a suit in its own behalf to test the legality of such order.

A very different situation, however, is presented to the Court in this proceeding. The parties challenging the order of the Commission are the parties against whom such order is directed. They are the parties who must obey such order unless its operation be stayed, and the damages which they will suffer are the direct result of such order, not of the independent setting up of any competitive agency by the Government or any other party.

Appellants also refer to the cases of *United States, et al.* v. *Los Angeles & Salt Lake Railroad Company,* 273 U. S. 299, and *The Delaware and Hudson Company, et al.* v. *United States, et al.,* 266 U. S. 438, in which proceedings final and tentative valuations of the properties

of such companies were challenged by such companies. These cases do not support appellants' contentions as they involved no affirmative orders of the Commission. In the latter case the court said at page 448:

> "The 'tentative valuation' of the statute is no more than an *ex parte* appraisement without probative effect."

In the former case the court likewise held the so-called order of the Commission involved no affirmative requirement and at page 312 said:

> "Nor does the fact that 'all final valuations * * * and the classifications thereof' are made *prima facie* evidence prevent the report from being solely an exercise of the function of investigation."

In fact, the clear distinction between the orders involved in the two valuation cases referred to and the order of the Commission before the Court here is made in *United States* v. *Los Angeles & Salt Lake Railroad Company, supra,* at page 309, where the court says:

> "The final report on value, like the tentative report is called an order. But there are many orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act. See *Proctor & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412; *United States* v. *Illinois Central R. R. Co.,* 244 U. S. 82, 89; *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438. For the first nineteen years of the Commission's existence no order was so reviewable. The statutory jurisdiction to enjoin and set aside an order was granted in 1906, because then, for the first time, the rate-making power was conferred upon the Commission, and then

disobedience of its orders was first made punishable. Hepburn Act, June 29, 1906, c. 3591, Secs. 2-7, 34 Stat. 584, 586-595. The first suit to set aside an order was brought soon after. *Stickney* v. *Interstate Commerce Commission*, 164 Fed. 638; 215 U. S. 98. The jurisdiction conferred by the Hepburn Act was transferred, substantially unchanged, to the Commerce Court, by the Act of June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; and, when that court was abolished, to the district courts, by the Urgent Deficiencies Act. The so-called order here assailed differs essentially from all those held by this Court to be subject to judicial review under any of those Acts. Each of the orders so reviewed was an exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate making and rule making."

The order of the Commission complained of in this case constitutes an exercise of its rate-making and rule-making power as defined in *United States* v. *Los Angeles & Salt Lake Railroad Company, supra*, and the right of these appellees, against whom the order of the Commission is directed, to challenge such order when made under circumstances amounting to a denial of due process of law cannot be questioned.

The affidavits filed in this proceeding by appellees clearly sustain their allegation of damages. They show the diversion of traffic which would result from their compliance with the Commission's order requiring them to become the unwilling partners of the American Barge Line Company. The affidavits also show the extent to which the earnings of appellees will be depleted under said order even as to the traffic which they handle jointly with the Barge Line. Thus, in the affidavit of S. C.

Mathews (R. 6869) it is shown that on traffic from Memphis to Boston the earnings of the rail lines under the maximum joint rail and water rate will be 8.1c per 100 pounds less than under the all rail rate maintained by appellees. Appellees have thus been damaged both by diversion of traffic and by volume of earnings on traffic handled by them jointly with the Barge Line by the affirmative order of the Commission directed against them, which order constitutes an exercise by the Commision of its rate-making and rule-making power and may properly be challenged by them.

Appellees have exhausted their remedies before the Commission to stay its order and can only be protected from irreparable injury through the process of a court of equity. Section 3(e) as interpreted and enforced by the Commission would require appellees to maintain and observe the maximum rates prescribed during the pendency of the subsequent hearing contemplated by the statute, and no recoupment of any damage so suffered is provided for by the statute, nor in fact would it be possible to provide for such recoupment if the Commission subsequently determined that it erred in its first order.

In similar cases the courts have held injunctions may properly issue. Principal among such cases is *Pendergast* v. *New York Telephone Company*, 262 U. S. 43, involving an order of the Public Service Commission of New York fixing telephone rates pending final investigation and determination of the matter by the Commission. An injunction against such order issued by the District Court was upheld by the United States Supreme Court, that court saying at page 49 of its opinion:

> "Nor did the fact that the orders of the Commission merely prescribe temporary rates to be effec-

tive until its final determination, deprive the Company of its right to relief at the hands of the court. The orders required the new reduced rates to be put into effect on a given date. They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the Company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process."

To the same effect is the decision of the Supreme Court in *Northern Pacific Ry. Co.* v. *Department of Public Works*, 268 U. S. 39, where at page 45, the court states:

"The invalidity was not avoided by making the order, in terms, for an experimental period. The rates as to which the evidence was primarily directed were those in force before and during the hearings."

Similarly in *Indiana General Service Co.* v. *McCardle*, 1 Fed. Sup. 113, the temporary order of the Indiana Public Service Commission was enjoined where such order was made effective by the Commission pending final investigation and determination of the matter before it. In the opinion of the three-judge District Court it is stated as follows at page 116:

"If the schedule of rates, as provided in such emergency order, becomes effective, pending final hearing, it prima facie will deprive plaintiff of its property without due process of law, and deny to it the equal protection of the law in violation of the

Fourteenth Amendment to the Constitution of the United States. The injury to plaintiff will be certain and irreparable, unless an interlocutory injunction is issued. If plaintiff is compelled to accept the rates as fixed by the emergency order of the commission, there is no way by which it can be reimbursed in the event the commission should finally determine that such reduction is excessive."

IX.

BY REASON OF THE REFERENCE TO SECTION 15 (3) OF THE INTERSTATE COMMERCE ACT FOUND IN SECTION 3 (e) OF THE INLAND WATERWAYS ACT, SAID SECTION 3 (e) MIGHT BE CONSTRUED SO AS TO SAVE ITS CONSTITUTIONALITY.

While there is little doubt that Congress in Section 3 (e) of the Inland Waterways Act as amended, intended to dispense with the necessity of hearings prior to the entry and enforcement of orders requiring joint rail and water rates, and that such intent of the Congress was properly interpreted by the Interstate Commerce Commission, it is suggested by appellees that Section 3 (e) may, in view of the language in the section itself, notwithstanding this intention of Congress, be given an interpretation which will preserve its constitutionality.

It is of course true that no canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within and the other beyond the constitutional power of the lawmaking body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the legislature intended to act within the scope of its authority. See *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, *Ann Arbor R. R. Co.* v. *United*

States, 281 U. S. 658. *Interstate Commerce Commission* v. *Oregon-Washington Railroad & Navigation Company*, 288 U. S. 14.

Section 3 (e) provides that after any person, firm, or corporation, including the Inland Waterways Corporation, shall obtain a certificate of public convenience and necessity in accordance with the provisions of Section 1 of the Interstate Commerce Act, the Interstate Commerce Commission "shall thereupon by order direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations and practices as provided in Paragraph 3 of Section 15 of the Interstate Commerce Act as amended * * *." Thus the Commission is directed to require these routes and joint rates in accordance with the provisions of Paragraph 3 of Section 15 of the Interstate Commerce Act, which section requires that such action of the Commission be taken "after full hearing." Section 3 (e) might therefore be construed as requiring the same procedure in the establishment of joint rail and water rates as is contemplated by Paragraph 3 of Section 15.

CONCLUSION.

In this proceeding appellees secured in the court below an injunction restraining the enforcement against them of an order of the Interstate Commerce Commission made without hearing, on the grounds of its unconstitutionality. Appellants before this court substantially concede the unconstitutionality of an order made in such manner, but seek to sustain the order upon the theory that by pursuing a certain procedure these appellees might have obtained a hearing before the Commis-

sion. That appellees would have obtained such a hearing is negatived by the language of the statute and by the interpretation placed upon it by the Commission. The judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX.

Section 3 (e) of the Inland Waterways Corporation Act of June 3, 1924, c. 243, 43 Stat. 360, as amended by the Act of May 29, 1928, c. 891, sec. 2 (e), 45 Stat. 978, (U. S. Code, Title 49, Sec. 153 (e)), provides as follows:

"Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of this title, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of section 15 of this title, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equi-

table divisions within one hundred and twenty days from date of publication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this section; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible."

SUPREME COURT OF THE UNITED STATES.

No. 422.—October Term, 1933.

The United States of America, Interstate Commerce Commission, et al., Appellants, *vs.* Illinois Central Railroad Company, et al.	Appeal from the District Court of the United States for the District of Delaware.

[March 5, 1934.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought by the Illinois Central Railroad Company and other railroad carriers, under the Urgent Deficiencies Act of October 22, 1913, U. S. C., Title 28, § 47, as amended by the Act of February 13, 1925, U. S. C., Title 28, § 345, to set aside, annul and enjoin the enforcement of an amended order of the commission, made under § 3 (e) of the Inland Waterways Corporation Act of June 3, 1924, c. 243, 43 Stat. 360, as amended, c. 891, § 2 45 Stat. 978. That section provides that any person, etc., about to engage in conducting a common carrier service upon certain designated waters may, upon application to the commission, obtain a certificate of public convenience and necessity in accordance with § 1 of the Interstate Commerce Act; and that the commission "shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates," and shall, in such order, "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service," etc. The commission is further authorized to require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of these joint differential rates, and if they are unable to agree within a time specified in the act, the commission shall determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The act further authorizes the commission, upon complaint, at once, and if it so orders, without

answer or other formal pleading, but upon reasonable notice, to enter upon a hearing concerning the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, etc., and after full hearings to "make such order with reference to any such matters as it may find to be proper and in the public interest." The burden of proof in such case is put upon the carrier or carriers making the complaint, and preference is to be given to the hearing and decision of the questions involved over all other questions pending before it, except where like preference is given by law; and the commission is directed to render a decision as speedily as possible.

Upon application under this section, the commission, after a hearing confined to that application, granted to the American Barge Line Company, a certificate of public convenience and necessity, *Application of American Barge Line Co.*, 182 I. C. C. 521; and thereupon, without further hearing, entered an order directing the interested carriers to establish through barge-rail routes and rates. Subsequently, in August or September, 1932, because of competition from unregulated truck and water carriers, the railroad carriers published all-rail carload rates on cotton lower than those previously in effect. These rates were further reduced in November, 1932. But the railroad carriers declined to join in joint water and rail rates; and, thereupon, the Barge Line sought from the commission supplemental orders requiring the establishment of rail-barge-rail rates between designated points. The rail carriers opposed the application and requested a hearing before action by the commission. This hearing the commission refused, and entered an order requiring the rail carriers to join with the Barge Line in publishing specified rail-barge-rail rates on cotton in carloads. The order, particulars of which need not be stated, was issued December 10, 1932, to become effective on January 25, 1933, which time was afterwards extended to June 1, 1933, a period altogether of nearly six months from the date of issue.

Appellees, on February 2, 1933, before the order had become effective, brought this suit and sought relief from the order, upon the grounds (1) that it was made without according them a full and fair hearing, and that § 3 (e) of the statute, in so far as it authorizes the commission to make and enforce the order without such hearing, contravenes the due process of law clause of the Fifth

Amendment; and (2) that it also constitutes a delegation to the commission of legislative power. The court below held with appellees upon the first ground, and entered a decree enjoining, setting aside, annulling and suspending the order of the commission. 3 F. Supp. 1005.

1. Assuming that the order in question, if enforced, would have the effect of depriving appellees of property or of property rights, we first inquire whether the statute, as interpreted and applied by the commission, does have the effect of denying appellants a full and fair hearing in respect of the matter prior to the enforcement of the order, and, consequently, fails to satisfy the constitutional requirement of due process of law. The provision of the statute that a certificate of public convenience and necessity to conduct a common carrier service upon the waters designated may be obtained upon application to the commission and *thereupon* the commission shall make the order described in the statute, undoubtedly empowers the commission to make the order, in the first instance, without a hearing. The commission, however, seems never to have held that it is not obliged upon complaint to grant a full and fair hearing after the making of the order but before putting it into effect. And both in the briefs filed on behalf of appellants, including the United States and the commission, and in the argument at the bar, the position is definitely taken that the order is tentative and the rates prescribed thereby cannot be enforced without a hearing if properly sought by appellees. The brief for the United States and the commission quotes from the concurring opinion of Commissioner Brainerd in *Ex parte 94, Procedure Under Barge Line Act*, 148 I. C. C. 129, 141, to this effect and adopts it as the view of the government and the commission. Upon the oral argument, in response to a direct question from the bench, this view was reiterated by the Assistant Solicitor General, his statement in effect being that the commission is bound to grant the hearing upon complaint being made by the railway carriers, and pending such hearing to postpone the effective date of the order upon a showing which is not frivolous. The conclusion of Commissioner Brainerd, thus adopted, is that if the commission issue a certificate of public convenience and necessity and enter an order without hearing, directing the establishment of through routes and joint rates and fixing reasonable minimum differentials, and later, before

said rates become effective, a complaint is filed by an interested carrier, "it would then be our duty to hear said complaint and decide said matter before said rates become effective; that in the event such a hearing is not had and the matter disposed of before the effective date of said rates, it would be our further duty temporarily to suspend them until said matter is decided; . . ." And he declared that this procedure would be necessary to comply with the requirements of due process of law.

This is an admissible construction of the statutory provisions. That the order made by the commission upon granting the certificate of public convenience and necessity is not final and conclusive is clear, since, by the affirmative provisions of the act, the railway carriers may file the through routes and joint rates pursuant to the preliminary order, and immediately, upon complaint, secure a full hearing from, and a plenary determination by, the commission. Pending that hearing, the commission is authorized to suspend the operation of the preliminary order for as long as seven months beyond the time when it would otherwise go into effect, Interstate Commerce Act, U. S. C., Title 49, § 15 (7); and it is made clear by what has already been said that upon application and proper showing the commission would consider itself bound to take such action.

The provisions of § 3 (e) with which we are dealing were enacted by Congress in an avowed effort to bring about cooperation on the part of the rail carriers with the water carriers. The report of the House Committee on the proposed legislation (H. Rept. 1537, 70th Cong., 1st Sess., pp. 5-6) recites the necessity of overcoming opposition on the part of the rail carriers in respect of through routes, joint rates, etc., without interminable delay and the heavy expense necessary to carry on proceedings before the Interstate Commerce Commission, as a necessary prerequisite to the realization of privately owned transportation service on the inland waterways of the country. Transportation Act, 1920, (U. S. C., Title 49, § 142) declares the definite policy of Congress to be "to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States." *Chicago, R. I. & P. Ry.* v. *United States*, 274 U. S. 29, 36. In the light of the situation disclosed by this report and of the policy declared by the act just named, Congress evidently prescribed the course of procedure which § 3 (e) requires.

Without attempting to lay down any general rule, but confining ourselves to the statute and case in hand, we accordingly hold that it was not essential, under the due process of law clause, that a hearing should be accorded in advance of the initiating order. It is enough that opportunity was given for a full and fair hearing before the order became operative. Since no routes or rates were in existence when the order was made, that order constituted the preliminary step toward their creation, equivalent, in essence, to an *ex parte* order on the carriers to show cause why the designated routes and rates should not be established. The effect of that order was simply to put upon the rail carriers the necessity, within a comparatively brief period, of either availing themselves of the right to file the routes and rates and appear and be heard in opposition thereto (the operation of the order in the meantime being held in abeyance), or of suffering them to go into effect by default. The statute gives preference to the hearing and decision of the questions involved, and directs the commission to render a decision as speedily as possible. Congress evidently believed that the procedure thus prescribed would bring about an earlier settlement of the matter than otherwise would be the case. The various steps to be taken constitute parts of the administrative process which must be completed before the extraordinary powers of a court of equity may be invoked. *Porter* v. *Investors Syndicate*, 286 U. S. 461, 470-471.

The constitutional question raised by appellees, therefore, vanishes from the case, because the commission concedes and stands ready to grant every administrative procedural right that appellees are lawfully entitled to claim. If the preliminary order be erroneous in any particular, it is susceptible of correction by the commission upon the hearing thus provided for. It will be time enough for appellees to seek the aid of a court of equity when they shall have fully availed themselves of this administrative remedy, and the commission shall have taken adverse action. Until then they are in no situation to invoke judicial action.

The provision of the statute which puts the burden of proof upon the carriers is not inconsistent with the due process clause of the Constitution. *New England Divisions Case*, 261 U. S. 184, 199; *Minn. & St. Louis R. R. Co.* v. *Minnesota*, 193 U. S. 53, 63.

2. The precise ground upon which appellees place their contention that the statute is invalid as constituting a delegation of legislative power is not entirely clear. Undoubtedly, the statute furnishes a sufficient primary standard to govern the action of the commission; and this appellees do not dispute. Their contention, as set forth in their brief, is that the only rule of decision laid down in § 3 (e) is that the through routes, rates and differentials to be established must be reasonable and lawful, and "such reasonableness and lawfulness can be determined only by a full and fair hearing, and the establishment of rates and routes and differentials without such hearing constitutes necessarily an exercise by the Commission of pure legislative power." Since the government and the commission concede that a full and fair hearing must be accorded before the order becomes effective, this objection to the statute, as a distinct ground, necessarily falls.

Decree reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 422.—October Term, 1933.

The United States of America, Interstate Commerce Commission, et al., Appellants, *vs.* Illinois Central Railroad Company, et al.	Appeal from the District Court of the United States for the District of Delaware.

[March 5, 1934.]

Mr. Justice Stone.

I concur in the result.

The statute, in words, authorizes the Commission to grant a hearing as to the reasonableness and lawfulness of the proposed rates and divisions, if complaint is filed, and the Commission has plenary power, upon consideration of the complaint, to postpone the effective date of the order and to suspend the rates after the order becomes effective. §§ 15 (7), 16 (6), Interstate Commerce Act.

As respondents have failed to invoke these administrative remedies by filing a complaint with the Commission, it seems plain that their rights, constitutional or otherwise, have not been infringed, and I see no occasion for speculation as to what the statutory duty of the Commission may be in the event a complaint is filed, or to resort to concessions of counsel in brief and argument to define that duty, or to suggest that the statute falls short of constitutional requirements if it fails to command the administrative action which it permits. The mere power, unexercised, to withhold constitutional right is not a denial of it. It is enough that respondents have filed no complaint with the Commission designed to secure a hearing. Before administrative action which respondents may invoke, but have not, it cannot be said that there is any infringement of their constitutional rights to a hearing or to protection from the rates pending a hearing. Compare *Pacific Tele-*

phone & Telegraph Co. v. *City of Seattle,* decided February 5, 1934; *Porter* v. *Investors Syndicate,* 286 U. S. 461, 470, 471.

Further, there is no intimation in the record that upon resort to the administrative remedies which the statute permits any relief to which respondents are justly and equitably entitled will be withheld. And there is no contention that the proposed rates will not yield a fair return or that they otherwise infringe constitutional rights. At most it appears that the interest sought to be protected is a prospective share in future traffic which it is feared may be diverted to the Barge Line, an interest to which the Constitution plainly affords no protection. *Edward Hines Trustees* v. *United States,* 263 U. S. 143, 148; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 279 U. S. 768, 780; *Sprunt & Son, Inc.* v. *United States,* 281 U. S. 249. Thus, regardless of what the statute commands, there is no such showing of threatened denial of a hearing or of injury to a property right as would warrant resort to the equity powers of a federal court. *Vandalia Ry. Co.* v. *Public Service Commission,* 242 U. S. 255; *United States* v. *Los Angeles R. R.,* 273 U. S. 299, 314; *White* v. *Johnson,* 282 U. S. 367, 373; *Porter* v. *Investors Syndicate, supra.*

Mr. Justice BRANDEIS, Mr. Justice ROBERTS, and Mr. Justice CARDOZO concur in this opinion.